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No. 90-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Petitioner,

—v.—

CAROL PUBLISHING GROUP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERIC M. LIEBERMAN
Counsel of Record
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway–Fifth Floor
New York, New York 10003
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway
New York, New York 10003
(212) 982-9870

JONATHAN W. LUBELL
MORRISON COHEN SINGER & WEINSTEIN
750 Lexington Avenue
New York, New York 10022
(212) 735-8600

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the fair use provisions of the Copyright Act authorize "substantial" copying in an unauthorized biography from published copyrighted works?

2. Whether the fair use provisions of the Copyright Act authorize grossly differing standards for the quantity of copyrighted material which may be copied depending only on whether the copyrighted material is published or unpublished?

3. Whether consideration of (a) the amount of taking of copyrighted material in relation to the infringing work and (b) the amount of the taking of copyrighted material in relation to each of the multiple copyrighted works from which it is taken is prohibited by the fair use provisions of the Copyright Act, as held by the court below?

4. Whether the fair use provisions of the Copyright Act permit (a) the taking of expressive copyrighted material, including poetry, simply because other takings are of factual copyrighted material and (b) the designation of philosophical and religious writings as factual rather than expressive?

5. Whether, under the fair use provisions of the Copyright Act, copyrighted works may be held to no longer have any untapped sources of economic profit merely because they have been published?

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No. 90-____

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,
Petitioner,

—v.—

CAROL PUBLISHING GROUP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner New Era Publications International, Aps,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-captioned proceeding on May 24, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 904 F.2d 152, and is reprinted in the

1 Pursuant to Supreme Court Rule 29.1, the Court is advised that petitioner New Era Publications International, Aps, which is incorporated under the laws of Denmark, is wholly owned by Publications Int, Ltd, which is wholly owned by International Publications Trust, a charitable and religious trust, the beneficiaries of which are religious and charitable organizations affiliated with the Scientology religion.

appendix hereto. 1a.[2] The opinion of the United States District Court for the Southern District of New York (Stanton, D.J.) is reported at 729 F.Supp. 992, and is reprinted in the appendix. 23a.

JURISDICTION

Petitioner brought this action for copyright infringement, invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1338. The complaint sought both injunctive relief and damages. On January 30, 1990, the district court issued an opinion preliminarily and permanently enjoining publication of respondent's book. 23a. Judgment was entered on February 13, 1990. 41a. The court of appeals had jurisdiction to hear respondent's appeal from the grant of the injunction under 28 U.S.C. § 1292(a). On May 24, 1990, the opinion of the court of appeals was entered. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, section 8, clause 8 of the United States Constitution provides that:

> The Congress shall have Power . . . To promote the Progess of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Section 107 of the Copyright Act of 1976, 17 U.S.C. § 107, provides:

> Notwithstanding the provisions of section 106, the fair use of copyrighted work, including such use by reproduction in copies or phonorecords or by any other

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2 References to "_____ a" are to the appendix to this petition. References to "JA_____" are to the Joint Appendix filed in the court below.

means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

Petitioner New Era is the exclusive licensee of the worldwide publishing rights to L. Ron Hubbard's published nonfiction works and his unpublished works. JA. 33. Mr. Hubbard was the founder of the Scientology religion and a prolific author. JA. 31-32. It is undisputed that there is a substantial market for Mr. Hubbard's writings. New Era intends to publish an authorized biography of Mr. Hubbard which will draw on both his published and unpublished works. JA. 33.

New Era learned in March 1989 that respondent Carol intended to publish an unauthorized biography of Mr. Hubbard written by Jonathan Caven-Atack,[3] entitled *A PIECE OF BLUE SKY: Scientology, Dianetics and L. Ron Hubbard Exposed* ("the book"). Having reason to believe that the biography might contain extensive quotations from Mr. Hub-

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3 Although he was originally named as a defendant, Atack, who lives outside the United States, was never served with a complaint and never made an appearance in the case.

bard's copyrighted works, and after Carol refused its request to review the manuscript of the book, New Era brought this action for copyright infringement.

Carol was ordered by the district court to produce the manuscript and, as noted by the district court, "[r]eview of the manuscript disclosed substantial quotation from copyrighted material. . . ." 24a. New Era then moved for a preliminary injunction, and the parties subsequently agreed to merge the proceedings for preliminary and permanent injunctive relief under Fed. R. Civ. P. 65(a)(2).

The decisions of the courts below present a number of crucial issues concerning the fair use factors of 17 U.S.C. § 107, and the decision of the court below has significantly altered the protection afforded copyright owners.

On January 30, 1990, the district court issued an opinion granting New Era's motions for preliminary and permanent injunctions, stating that the "book may not be published in its current form." 40a. The court found that the "book takes many passages from copyrighted sources", 28a, amounting to approximately 4000 words constituting 2.7% of Atack's book, 37a, and that this use was not justified under the fair use doctrine. The court also held that petitioner's copyright in one document entitled *HCO Manual of Justice* had expired. 27a.[4]

In concluding that Carol had infringed New Era's copyrights, the district court analyzed each of the four fair use factors enumerated in the Copyright Act, 17 U.S.C. § 107. With regard to the purpose and character of the use, the court first noted the commercial nature of the book and found that Carol's "potential profit" from the book " 'tends to weigh against a finding of fair use.' " 29a, *quoting Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 562 (1985). At the same time, the court recognized the coun-

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4 The Manual contained an additional 18 passages copied in Carol's book, totalling approximately 389 words. 26a. These additional words were not included in the district court's count of Carol's taking of copyrighted material.

tervailing general proposition expressed by the Court of Appeals for the Second Circuit that " '[a]s long as a book can be classified as a work of criticism, scholarship or research . . . the first factor cuts in favor of the book's publisher.' " 29a, *quoting New Era Publications International, Aps* v. *Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989) ("*New Era I*"). The court therefore observed that the "overall purpose and character of the use . . . tends" to favor Carol. 29a.

Having identified these conflicting tendencies, however, the court emphasized the importance under the first factor of " 'examination of how the particular taking of protected material serves the instructive goals that the fair use doctrine seeks to promote.' " 29a, *quoting Craft* v. *Kobler*, 667 F.Supp. 120, 126 (S.D.N.Y. 1987) (Leval, J.). The court concluded that "many of the specific uses of the copyrighted materials serve no fair use purpose." 29a.

The court made a thorough review of the specific uses made of the copyrighted materials in the book. As examples, the court pointed to seventeen passages set off by themselves at the beginning of many of the sections and chapters of the book. It found these quotations served "only as a backdrop," 30a, for the sections which follow them. Rather than serve as a basis for critical study, the court found these passages used copyrighted materials as "a literary device." 29a. Atack, the court found, did not analyze the passages or what they purportedly revealed about Mr. Hubbard. "No comment or criticism is directed at [them]. The passage[s] [are] merely set forth, for readers to make of [them] what they will." 30a. The court therefore concluded that such "gratuitous" uses "reproduce the work of Mr. Hubbard, rather than serve the scholarship, criticism, comment or research of Mr. Atack," and are "predatory," not "fair." 30a.

Similarly, the court found that many of the other quoted passages did "not contribute to the accuracy of the book or otherwise serve a fair use purpose." 31a. The court observed that one quotation about Mr. Hubbard's experiences in

Tibet, for instance, was taken for the sole purpose of showing its falsehood because, according to Atack, Mr. Hubbard was never in Tibet.[5] For this purpose, however, the court rightly concluded Atack could have "made that simple point by using only the facts and not the ebullient verbiage of Mr. Hubbard's passage." 31a.[6] Because "many of the passages lack any allowable fair use purpose," the court concluded that the first factor "strongly favors New Era." 32a.

The court next found that the second fair use factor, the nature of the copyrighted work, favored New Era as well. It determined that some of the copyrighted passages were essentially factual in nature because they either recounted historical facts about Mr. Hubbard or expounded on his scientific theories. As to these, the court found "some verbatim quotation is necessary." 33a. Nevertheless, "many" of the copyrighted passages were from Mr. Hubbard's "creative and philosophical writings," and are quoted for their "expressive content." 33a. As to these, Atack did not attempt to "cull[ ] the facts from the expressive materials in which they are contained." 35a. Instead, he "uses the entire quotation," 35a, even those expressive portions "superfluous to a factual discussion." 34a.

In analyzing the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the district court noted the various kinds of comparisons this Court and the lower courts have used, including assessing the quantity of the taking in relation to the infringing work. Implicitly acknowledging that some of these types

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5 The purported justification for Atack's appropriation of Mr. Hubbard's words appear in an affirmation by Atack executed four months after New Era brought suit. JA. 98.

6 As another example, the court pointed to a lengthy passage again quoted solely to show its falsity. The passage discussed Mr. Hubbard's war injuries and his subsequent recovery. For the "limited purpose" of challenging Mr. Hubbard's factual assertions, the court concluded, Atack "could have stated [their] substance." The effect of the quotation, however, was "to appropriate Mr. Hubbard's grandiose and extravagant expressions." 31a-32a.

of analysis are not prescribed in the statute, the court reasoned that "these courts have not used these various methods because of indifference to the statutory language." Rather, it found "courts make a pragmatic analysis of this factor, considering both the quality and quantity of the copyrighted materials used and conscious that the factors listed in Section 107 are not exclusive." 36a.

The court then found that the Atack book used Mr. Hubbard's copyrighted works in both qualitatively and quantitatively significant ways and that this factor also supported New Era. 36a-37a. In accordance with this Court's opinion in *Harper & Row* and other decisions, it looked to the importance of the copied materials to the infringing work in measuring the qualitative significance of the takings. It observed that Atack sets off passages "at the beginning of a part or chapter in order to set a general tone." 36a. As in *Harper & Row*, it therefore concluded, the book was " 'structured around the quoted excerpts which serve as its dramatic focal points.' " 36a, *quoting Harper & Row*, 471 U.S. at 566. In addition, it found that the quotations in the text of Atack's book are " 'an important ingredient of the book.' " 36a, *quoting Salinger* v. *Random House*, 811 F.2d 90, 99 (2d Cir.), *cert. denied*, 108 S.Ct. 213 (1987).

It further found that the quantity of copyrighted material used "reinforces this conclusion." 37a. First, it reasoned that it would be "of little value" to measure the quantity of copyrighted materials used in relation to all of the copyrighted works from which they were taken. 37a. This was due to the large number of Mr. Hubbard's works from which Atack copied. Such an approach would "reduce copyright protection for authors merely because their materials are lengthy or the body of their work is prodigious." 37a.

The court then found that approximately 4,000 copyrighted words are used in the Atack book, which represented 2.7% of the entire book. Moreover, in some cases "a rather large percentage" of the copyrighted sources was used. The court

concluded therefore that the quoted passages were "a small, but significant element of the book." 37a.

Finally, the district court analyzed the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work. It acknowledged that New Era "plans to produce an authorized biography of Mr. Hubbard which will include both his published and unpublished writings," 37a, and referred to the explicit holding of the court of appeals in *New Era I* that this factor favored New Era because the use of copyrighted matter in Holt's biography of Mr. Hubbard was likely to cause some impairment of the market. It further recognized that Atack's book "could have some effect on the market for the copyrighted works" because "[c]onsumers may find after reading the book that they have gotten a sufficient flavor of Mr. Hubbard's writings to deter them from buying the source materials." 38a. It nevertheless found that any effect on the potential market for New Era's biography "is speculative," 39a, and concluded that the fourth factor did not favor either party. Its sole basis for distinguishing *New Era I* was that Atack's biography did not contain unpublished material and therefore no "consumer will be drawn to the book because it contains materials that are unavailable elsewhere." 38a. No explanation was offered for why this would negate the impact on the potential market for New Era's forthcoming biography which the same court found in *New Era I*.

Based on its analysis of these factors, the district court concluded that Carol had failed to establish its fair use defense. 39a. It also found this case appropriate for issuance of injunctive relief. Finding that the book "is still in manuscript form," it concluded the only hardship which would result from issuance of an injunction would be some delay in publication of the book and a more "stringent editing process." The editing process would be "relatively simple and inexpensive" and would require only "deletion of the infringing passages." 39a. The district court also noted that in the Second Circuit "irreparable harm is normally presumed if infringement is demonstrated." 39a, *citing Wainwright Secu-*

rities Inc. v. *Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

On February 13, 1990, the district court entered judgment in favor of New Era. 41a. Carol appealed the district court's decision to the United States of Appeal for the Second Circuit.[7] On May 24, 1990, the Second Circuit reversed the judgment of the district court with respect to its fair use findings.[8]

Contrary to the district court, the court of appeals found that each of the fair use factors favored Carol. The court held that once it is found that the work falls into the categories of "criticism, scholarship or research," assessment under the purpose and character of the use factor should be at an end, and this factor must be found to weigh in the user's favor. The court acknowledged, however, that in *Harper & Row* this Court did not foreshorten its analysis of the first factor in this way. 8a-9a.

The court ignored the district court's holding that analysis under the first factor requires examination of how the particular takings serve the goals of the fair use doctrine and ignored the district court's finding that many of the specific uses here served no fair use purpose. The court implicitly substituted its own conclusory findings that the author used "the quotations in part to convey facts contained therein, and not for their expression." 9a. The court even considered justified the taking of "passages used for their expression" because Mr. Hubbard's alleged personality traits "may best (or only) be revealed through direct quotations." 9a. Finally, the court justified what it acknowledged was the "borderline use" of some of the quotations set off at the beginning of the book's chapters on the ground that they "serve the author's purpose by juxtaposing the grandiose expression of

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7 The petitioner cross-appealed the district court's ruling that the copyright in the *HCO Manual of Justice* had expired.

8 The Court of Appeals affirmed the judgment of the district court with respect to its finding that the copyright in the *HCO Manual of Justice* had expired in 1987. This petition does not address that portion of the judgment below.

the quotations with the banal (to the author) material contained in the body of the chapter." 10a.

In its analysis of the second factor, the court of appeals suggested that "substantial" quotations from copyrighted works are permissible where the work has been published. The court did not explicitly dispute petitioner's contention that in *Salinger* v. *Random House*, 811 F.2d 90 (2d Cir.), *cert. denied*, 494 U.S. 890 (1987), it had "interpreted *Harper & Row* to mean only that the likelihood 'that copying will be found to be a fair use is diminished when the copyrighted material is unpublished, not that a greater quantity of copying of published works is permitted.' " 12a. Instead, the court of appeals purported to find authority for substantial quotation for published works in a single phrase from this Court's opinion in *Harper & Row*: " 'even substantial quotations might qualify as fair use in a review of a published work,' 471 U.S. at 564." 12a. The court rejected the view that "*Harper & Row* intended to allow liberal quotation only for the purpose of literary criticism or review of published works" as being "entirely too literal-minded." 12a.

The court recognized that the scope of fair use is greater with respect to factual as opposed to non-factual works. 11a. Despite having "some hesitation," the court held that Mr. Hubbard's writings giving "his views on religion, human relations, the Church, etc." should be considered under fair use analysis to be factual rather than non-factual. 11a.

The court also acknowledged that some of the quoted passages were more "creative or expressive than factual," and that "reasonable people can disagree over how to classify Hubbard's works," but nevertheless held that most of the passages were factual. 13a. The court's holding that the second factor favored Carol thus took no account of Carol's taking of those passages the court acknowledged to be creative.

The court adopted an extremely narrow interpretation of the analysis required under the third factor. Regarding the quantity of the taking, the court insisted that it assess the

amount of the taking only as compared to the totality of *copyrighted* works. While acknowledging that Carol had taken 8% or more from 11 works, 5-6% of 12 other works and "miniscule" amounts of 25 other works, the court held that the takings were "not so much as to be unfair." 14a.

The court acknowledged that the takings constituted 2.7% of Carol's book. 15a. Despite this Court's explicit consideration of the amount of the taking in relation to the infringing book in *Harper & Row*, the court below attached no significance to this figure on the ground that section 107 commanded it to consider the taking in relation to the copyrighted work. The court therefore explicitly rejected petitioner's argument (and implicitly rejected the district court's conclusion) that because of the great length of Hubbard's works and because so many of his writings were quoted by Carol, it would be of little value to focus on the amount of the taking in relation to the copyrighted works. 15a-16a.

The court also held the taking was not qualitatively unfair, finding that the quotations did not take the heart of Mr. Hubbard's works. 15a. The court did not address the district court's finding that the quotations were "an important ingredient of the book." 36a.

Finally, the court found that the fourth factor favored Carol. The court expressed skepticism that potential customers for an authorized biography of Mr. Hubbard would be deterred from buying it because Carol's "unfavorable" biography quotes from his works. 17a. The court ignored the district court's finding that "[c]onsumers may find after reading [Carol's] book that they have gotten a sufficient flavor of Mr. Hubbard's writings to deter them from buying the source material." 38a.

Finally, the court attempted to distinguish the conclusion of the court of appeals in *New Era I*, which held that publication of the biography in issue there could have an effect on the market for the forthcoming authorized biography of Mr. Hubbard. The court emphasized that *New Era I* involved previously unpublished writings of Mr. Hubbard, whose market

value, the court stated, "had not yet been realized" and "might be entirely misappropriated by the infringing publication" 19a. The court found here, in purported contrast, that because the copyrighted works were all published, "the book will not tap any sources of economic profit that would otherwise go to the authorized biography." 19a.

On June 11, 1990, the court of appeals denied petitioner's motion for an injunction pending filing and disposition of its petition for a writ of certiorari. On June 18, 1990, Justice Marshall denied petitioner's application for a stay pending filing and disposition of this petition for a writ of certiorari. As of August 20, 1990, the book has not been published.

REASONS FOR GRANTING THE PETITION

In recent years, great uncertainty and disagreement have pervaded the lower courts regarding the proper application of the fair use exception to the copyright laws. As one federal judge recently noted:

> Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use.

Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1106-07 (1990).[9]

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9 *See, e.g., Salinger* v. *Random House, Inc.*, 650 F.Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications International* v. *Henry Holt & Co.*, 695 F.Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989), *reh'g en banc denied by 7-5 vote*, 884 F.2d 660 (1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1168 (1990).

A number of commentators also have discussed the confused state of the law. *See, e.g.*, Fisher, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661 (1988); Dratler, *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. Miami L. Rev. 233 (1988); and Weinrib, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137 (1990).

The dispute and confusion is over a question of national signficance: the relative rights of copyright holders in the creations they own and the rights of those who would appropriate copyrighted expression in aid of their own creations. As this Court has recognized, "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 558 (1985). Protecting copyrights and striking the correct balance between copyright holders and users is therefore an issue of fundamental public interest, warranting this Court's attention.

The opinion of the court below in this case fundamentally upsets the proper balance between copyright holders' and users' rights in published copyrighted materials and has thereby seriously jeopardized the rights of copyright holders secured by the United States Constitution, the Copyright Act of 1976, and prior case law. Specifically, this Court's review is warranted for the following five reasons.

1. The court below has granted unprecedented latitude to those who would use published copyrighted material. In its opinion, the court below has upset the balance that prior decisions have struck between the rights of holders of copyrights in published works and those who would copy from those works. Previously, it was well established that only *occasional* quotation from published works was permitted. *See Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (it is permissible for biographers to "refer to and utilize earlier works dealing with the subject of the work and *occasionally* to quote from such works") (emphasis added). *See also Meeropol* v. *Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1031 (1978), *quoting Rosemont*, 366 F.2d at 310 ("The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material cannot satisfy that standard"); *see also Weismann* v. *Freeman*, 868 F2d 1313, 1325 (2d Cir.

1989) ("We have previously held that the fair use privilege is grounded upon reasonableness, which may not be found in cases where there has been extensive verbatim copying or paraphrasing of another's material.")

The court below established a new, expansive standard for the copying of published works which conflicts with and presumably purports to overrule prior law. The court held that "substantial" or "liberal" copying of these works is justified as fair use. 12a. Petitioner submits that change in law wrought by the court below conflicts not only with prior federal appellate decisions but also with the purposes of the copyright law and with the views of this Court implicit in its opinion in *Harper & Row*.

The court below altered the standard permissible level of copying published works from "occasional" to "substantial" in purported reliance on a single, limited phrase in *Harper & Row* in which this Court stated that "even substantial quotations *might* qualify as fair use in a review of a published work. . . ." 471 U.S. at 564. *See* 12a (Emphasis added.) This very specific and qualified remark cannot bear the broad meaning the court below places on it. In fact, this Court's opinion in *Harper & Row* weighs strongly against the conclusion the court below draws from this single phrase.

As noted above, this Court recognized in *Harper & Row* the powerful public interest behind the protection of copyrights; they were intended by the Framers to be "the engine of free expression" and to provide "the economic incentive to create and disseminate ideas." 471 U.S. at 558. There is nothing in the Court's opinion to suggest that these fundamental principles do not apply fully to published works; to the contrary, the clear implication is that all copyrighted works are deserving of solicitous protection. *See, e.g.*, *Harper & Row*, 471 U.S. at 546, where this Court noted the right of authors to exclusive control of their works for the copyright term—*i.e.*, for a specified period even after publication.

The statement of this Court relied on by the court below as support for "substantial" copying of published works was addressed only to "a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press." *Harper & Row*, 471 U.S. 564. Despite the specificity of the statement, the court below rejected as "entirely too literal-minded," 12a, the interpretation that this Court, in fact, conceived that substantial copying might be justified only in the limited circumstances addressed, and was not generally endorsing "substantial" copying of published works. Petitioners respectfully submit that limiting of the circumstances in which a published copyrighted work may be subjected to substantial copying was precisely what this Court intended. Petitioner submits that certiorari should be granted so that the court may speak definitively to this question in this case, where the book at issue is a biography which quotes liberally from copyrighted materials and does not purport to be a "review" or a news account of a speech.

This Court noted in *Harper & Row* that in enacting the Copyright Act of 1976, Congress " 'intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.' " 471 U.S. at 549, *quoting* H.R. Rep. 1476, 94th Cong., 2d Sess. 66, *reprinted at* 1976 U.S. Code Cong. & Ad. News 5659, 5680. Since the "occasional" copying standard of *Rosemont*, 366 F.2d at 307, was the law at the time of passage of the 1976 Act, there is reason to believe Congress intended this to remain the general standard for the copying of published works.

The pernicious effect of the court of appeals' change of law is demonstrated in this very case. While the court of appeals would extend heightened protection to the work merely because it purports to be a "critical biography", in reality the book is a pastiche of *ad hominem* attacks upon its subject combined with wholesale copying of the copyrighted

works of that subject.[10] Surely neither Congress nor this Court in *Harper & Row* intended to permit an author to secure virtual immunity for his substantial violation of another author's copyright rights merely by clothing his infringements within the form of a so-called "critical" biography.

Indicative of the questionable nature of the new standard adopted by the court below is its conflict with the analysis in *Salinger* v. *Random House, Inc.*, *supra*. The *Salinger* court expressly considered whether *Harper & Row* meant that "the amount of copyrighted material that may be copied as fair use is a lesser quantity for unpublished works than for published works." 811 F.2d at 97. It concluded, however, that in context this Court intended only that the *likelihood* that copying will be a fair use is *diminished* when the copyrighted material is unpublished, not that the copying of a greater quantity of published works is permitted. *Id.*

In its opinion, the court below apparently understood that the *Salinger* court interpreted *Harper & Row* not to permit a greater amount of copying of published works. 12a. Yet it clearly disagreed with that view. Thus, there are now two interpretations within the Second Circuit of the meaning of *Harper & Row* as to whether the permissible amount of copying of published and unpublished works is different or not. A definitive statement of the law by this Court is needed.

2. The court's ruling creates a wide gulf between the limits on copying of published works and unpublished works. The decision of the court below creates widely disparate standards

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10 The version of the book at issue was authored by Jonathan Atack without concern for the copyright laws. He rummaged with impunity through Mr. Hubbard's copyrighted works—Atack lifted some 121 passages from 48 different copyrighted Hubbard works covering a broad variety of writings—from poetry to unique travel descriptions to religious and philosophical pronouncements. With copyright piracy as his means, Atack sought broadly to exploit for solely economic purposes the works and name of another while stretching the blanket of fair use beyond any previous bounds.

for the permissible amount of copying of published and unpublished works. Under the current law, "an infringer who 'copies more than minimal amounts of [unpublished] expressive content' . . . deserves to be enjoined." *New Era Publications International* v. *Henry Holt & Co.*, 884 F.2d at 661, *quoting Salinger*, 811 F.2d at 96; *see also New Era International* v. *Henry Holt & Co.*, 873 F.2d at 583 and *Salinger*, 811 F.2d at 97.

If the decision of the court below stands, "substantial" or "liberal" copying of published works would be permitted even though no more than minimal copying of unpublished work is allowed. Nothing in the statute authorizes this wide disparity. Nor does this Court's opinion in *Harper & Row* provide any indication that such widely differing standards are appropriate. The Second Circuit panel in *Salinger* unquestionably believed that widely differing quantitative standards are not proper since it did not believe that *Harper & Row* authorized *any* difference between the amounts of published and unpublished materials which could be justified under fair use. 811 F.2d at 97. Petitioner submits that this Court should grant certiorari to consider whether it endorses the adoption by the court below of such contrasting standards.

3. The court below rejected methods of calculating the quantity and quality of the taking of copyrighted materials endorsed by this Court. Regarding the third fair use factor, the district court found in favor of the petitioner in part because approximately 2.7% of respondent's book (about 4,000 words) was copied from works copyrighted to petitioner. 37a. In considering the percentage the copyrighted material constituted of the *infringing* book as one measure of the extent of the taking, the district court merely followed prior law, most importantly *Harper & Row*, 471 U.S. at 565-66. *See also Salinger*, 811 F.2d at 98-99; *Meeropol*, 560 F.2d at 1070-71 (taking considered substantial because although copyrighted material represented less than one percent of the infringing work, it was prominently featured in promotional materials); *Craft* v. *Kobler*, 667 F.Supp. 120, 128-29 (S.D.N.Y. 1987).

The court below rejected this analysis on the ground that "Section 107 plainly commands us to consider 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole.' " 16a. (Emphasis in original.) The refusal of the court below to accept comparison of the portion used to the *infringing* work as one valid measure of the quantity of the taking is contrary to law, as established by this Court in *Harper & Row*.

Not only did the court below improperly reject comparison of the takings to the infringing work, it also erroneously refused to consider the substantiality of the takings in comparison to the particular copyrighted works. This case involved respondent's substantial copying of material from numerous copyrighted works. There were significant takings from numerous individual works—five percent or more was conceded to have been taken from twenty-three distinct copyrighted works. Yet the court of appeals simply concluded that "the book uses overall a small percentage of Hubbard's works." 14a. In reaching this conclusion, court explicitly rejected petitioner's argument that "because of the length of Hubbard's works and because so many of his writings were quoted from, it would be of little value to focus on the amount of infringing material in relation to the copyrighted works. . . ." 15a. The court's purported rationale for its rejection of petitioner's argument was, again, the language of Section 107. Petitioner submits that the statutory language encourages rather than discourages individual assessment of the takings from each particular copyrighted work. In any event, given the insistence of the court below on the sparse language of the statute despite the fact that the enumerated statutory standards are not meant to be exclusive, *see Harper & Row*, 471 U.S. at 549, clarification of the acceptable methods of measuring the quantity of the taking is needed.

Petitioner submits that the position of the court below, if upheld, will have a devastating effect on copyright owners. If the percentage of the taking is to be calculated against the total number of words in copyrighted works from which any copying has been made, prolific authors will be unfairly prej-

udiced. Infringers will be able to enhance their chances of obtaining a fair use ruling by copying from numerous works of a copyright holder, thereby lowering their copying as a percentage of the overall works from which they quoted.

The approach of bluntly measuring the taking as a gross percentage of the works quoted from squarely conflicts with the approach other courts have previously taken. For example, in *Salinger*, 811 F.2d at 98, the court considered the percentages taken of each copyrighted work. In the wake of the decision below, neither copyright holders nor those who would use their works have a guideline to reasonably predict the coverage of fair use as a result of these conflicting approaches. Furthermore, under the standard of the court below, one cannot reasonably predict the fair use application to the unauthorized publication of a higher percentage of a copyrighted work where the infringer makes minimal use of numerous other works of the copyright holder so the infringing publication constitutes "overall a small percentage of [the author's] works." 14a.

4. The court distorted the analysis of the nature of the copyrighted work. Similar to its distortion of the third factor is the court's skewed analysis of the second factor, concerning nature of the copyrighted work. The court acknowledged that some of the copyrighted works were creative or expressive as opposed to factual.[11] Yet because it found that more

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11 A prime example of expressive material taken was a quotation from Mr. Hubbard's poem *Hymn of Asia*:

> Appoint Amongst you
> some small few
> To tell about me lies
> And invent wicked Things
> And spread out infamy
> Abroad and Within
> And to stand before
> our altars
> And insult and
> Lie and tell
> Evil rumors about us all.

JA 47.

passages taken were factual than creative, it discounted the taking of creative material, and concluded that the nature of the copyrighted work factor favored Carol. The decision thus significantly changes a crucial aspect of the fair use doctrine by permitting the publication of entirely expressive passages on the grounds that most of the other claimed infringing passages cannot be so characterized.

The court's failure to take account of creative passages is compounded by its decision to treat Mr. Hubbard's philosophical and religious writings as "factual".[12] This approach is not supported by any prior law, and this Court's authoritative view of whether philosophical and religious works are expressive or factual is needed.

5. The court's opinion makes it virtually impossible for the copyright holder to demonstrate economic injury from the copying of published works. The analysis of the market factor by the court below also creates new law, making it virtually impossible for the holder of copyrighted works to demonstrate economic injury from copying of published works. The opinion suggests that only copyrighted material that has not yet been published has market value which has "not yet been realized" and that where, as in this case, "the works quoted from are all published . . . the book will not tap any sources of economic profit that would otherwise go to the authorized biography." 19a. The clear implication of the court's statement is that there is no longer any market value to protect once a work has been published.

The court's view is in conflict with the Copyright Act and prior case law, and is fundamentally inconsistent with the Copyright Clause of the United States Constitution. Article I, Sec. 8, cl. 8 grants Congress the power to secure to authors the exclusive right to their writings for limited periods of time. The public is allowed access only "after the limited period of exclusive control has expired." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429

12 The court itself recognized the suspect nature of its classification of these writings, as it expressed "some hesitation" over its choice. 11a.

(1984). Consequently, Section 106 of the Copyright Act "confers a bundle of exclusive rights to the owner of the copyright" which may be utilized throughout the period of exclusive control. *Harper & Row*, 471 U.S. at 446-47 & n.1. Thus the Constitution and the Act are premised on the view that the property rights conferred have value throughout the period of the copyright, a fact recognized by this Court.

Consistent with this view, the final fair use factor focuses on "the effect of the use upon the *potential* market for or value of the copyrighted work." 17 U.S.C. § 107(4); *see also Salinger*, 811 F.2d at 99. It is clear that there is a potential market for the republication or continued publication of an already published work. *Cf. Meeropol*, 560 F.2d at 1070 (court may find a potential market effect even if the copyrighted work is out of print). Furthermore, the prior case law makes clear that courts must consider the potential harm "to the market for derivative works." *Harper & Row*, 471 U.S. at 568; *see also Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos., Inc.*, 621 F.2d 57, 62 (2d Cir. 1980), and *Meeropol*, 560 F.2d at 1070. Here, petitioner has established that it intends to market a derivative work—the authorized biography of Mr. Hubbard—drawing from the published copyrighted works and deriving a portion of its value from its use of those works. Moreover, the allegedly infringing book is precisely the same type of derivative work, a biography of Mr. Hubard drawing on his copyrighted work. Yet the opinion of the court below holds that the copyrighted works have no continuing value since they have already been published. Petitioner submits that the court's opinion constitutes a significant change of the law, raising a substantial issue for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway-Fifth Floor
New York, New York 10003
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway
New York, New York 10003
(212) 982-9870

JONATHAN W. LUBELL
MORRISON COHEN SINGER
& WEINSTEIN
750 Lexington Avenue
New York, New York 10022
(212) 735-8600

Counsel for Petitioner

August 22, 1990

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1204-1376—August Term 1989

Argued: April 2, 1990 Decided: May 24, 1990

Docket Nos. 90-7181, -7193

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Plaintiff-Appellee/
Cross-Appellant,

—against—

CAROL PUBLISHING GROUP,

Defendant-Appellant/
Cross-Appellee.

Before:

FEINBERG, PRATT and WALKER,
Circuit Judges.

Appeal and cross-appeal from February 13, 1990 judgment of the United States District Court for the Southern District of New York, Louis L. Stanton, J. District court permanently enjoined appellant from pub-

lishing a biography in its present form on grounds of copyright infringement, finding that biography's quotations from its subject's published works did not constitute "fair use" under 17 U.S.C. § 107. Court also found that copyright had expired on one of the works quoted in the biography. Held: Each of the four factors of § 107 favors appellant; biography's use of passages from its subject's published works was fair use. On cross-appeal, district court's determination that copyright had expired on one of the works was correct.

Reversed in part and affirmed in part.

MELVIN L. WULF, New York, NY (Beldock Levine & Hoffman, of Counsel), *for Defendant-Appellant/Cross-Appellee.*

MICHAEL LEE HERTZBERG, New York, NY (Rabinowitz, Boudin, Standard Krinsky & Lieberman, P.C., Eric M. Lieberman, David M. Golove, Jonathan W. Lubell, of Counsel), *for Plaintiff-Appellee/Cross-Appellant.*

FEINBERG, *Circuit Judge*:

Defendant Carol Publishing Group appeals from a February 13, 1990 judgment of the United States District Court for the Southern District of New York, Louis L. Stanton, J., permanently enjoining it from publishing a biography in its present form, on grounds of copyright infringement. In an opinion reported at 729

F. Supp. 992, the district court held that the biography's quotations from its subject's writings—all of which had been published—did not constitute "fair use" under 17 U.S.C. § 107, and that the copyright on one of the works quoted from had expired. We disagree with the former conclusion but agree with the latter, and thus reverse in part and affirm in part.

Background

The biography at issue in this appeal is entitled *A Piece of Blue Sky: Scientology, Dianetics and L. Ron Hubbard Exposed*, and was written by Jonathan Caven-Atack. (We will refer to *A Piece of Blue Sky* as "the book" and to Caven-Atack as "the author.") The subject of the book is L. Ron Hubbard, the controversial founder of the Church of Scientology (the Church), who died in 1986.

The author joined the Church when he was 19 and was a member for almost nine years. In 1983, however, according to the author, his faith in the Church was shaken by what he saw as the Church's repressive practices toward dissident members. The author subsequently resigned from the Church, but undertook a thorough investigation into the Church and Hubbard. During the course of this inquiry, the author became convinced that the Church was a dangerous cult, and that Hubbard was a vindictive and profoundly disturbed man.

The author's investigation culminated in the book, which, in its present manuscript form, is 527 double-spaced pages in length. As its title makes plain, the book is an unfavorable biography of Hubbard and a

strong attack on Scientology; the author's purpose is to expose what he believes is the pernicious nature of the Church and the deceit that is the foundation of its teachings. The book paints a highly unflattering portrait of Hubbard as a thoroughgoing charlatan who lied relentlessly about his accomplishments. The author's attitude toward his subject can be gauged by his descriptions of Hubbard as "an arrogant, amoral egomaniac," "a paranoid, power hungry, petty sadist," and—perhaps ironically in light of the claims in this case—"an outright plagiarist."[1] The book quotes widely from Hubbard's works, using passages from Hubbard's writings both in the body of the text and at the beginning of many chapters. The author had a rich vein of material to mine, because Hubbard wrote prolifically on a wide variety of subjects, including science fiction, philosophy and religion. We are informed that Hubbard published nearly 600 fiction and non-fiction works during his lifetime, 111 of which are in print.

Plaintiff-appellee/cross-appellant New Era Publications International, ApS is the exclusive licensee of Hubbard's works. After learning that appellant Carol Publishing Group intended to publish the book, appellee sued appellant in the district court. (Although appellee named the author as a defendant, it did not serve him with a summons and complaint, and he has never entered an appearance.) Appellee claimed that the book copied "substantial portions" of certain of Hubbard's works in violation of its exclusive copyright rights under 17 U.S.C. § 106, and accused appellant of willful copy-

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1 We note here what should be obvious but nevertheless bears stating. We express no view of our own as to Hubbard, his teachings or the Church. The unflattering characterizations are those of the author of the book.

right infringement under 17 U.S.C. §§ 106 and 501. In particular, appellee argued that 121 passages of the book were drawn from 48 of Hubbard's works. The complaint sought, among other things, an injunction to stop publication of the book. Appellee subsequently moved for a temporary restraining order and a preliminary injunction; by stipulation, the proceedings for a permanent and for a preliminary injunction were later merged.

The district court granted a permanent injunction. It held, first, that the copyright had expired on one of the works quoted in the book, the *HCO Manual of Justice*. 729 F. Supp. at 995. The court then went on to determine whether the book's use of passages from Hubbard's other works was protected "fair use" under 17 U.S.C. § 107, which is reproduced in the margin.[2] Id. at 995-1001. The district court analyzed the four factors spelled out in § 107, and found that factor one (purpose and character of the use) "strongly" favored appellee, because "many of the passages lack any allowable fair

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2 Section 107 provides that:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

use purpose," id. at 998; factor two (nature of the copyrighted work) favored appellee since "so many" of the quoted passages "are expressive rather than factual," id. at 999; factor three (amount used in relation to copyrighted work as a whole) also favored appellee, because the quoted passages amount to a "small, but significant element of" the book, id. at 1000; and that factor four (effect of use on the market for the copyrighted work) did not favor either party. Id. at 1001. The district court thus concluded that appellee was entitled to a permanent injunction against publication of the book in its present form, noting that "[t]he book is still in manuscript form, so deletion of the infringing passages will be relatively simple and inexpensive." Id. at 1001. The district court thereafter entered judgment, listing 103 infringing passages taken from 43 works, all published.

Appellant now appeals from the judgment granting an injunction, and appellee cross-appeals from the district court's determination that the copyright on the *HCO Manual* had expired.

Discussion

1. *Fair Use*

Appellant asserts that, contrary to the district court's view, all four fair use factors referred to in § 107 weigh in its favor, while appellee argues to the contrary. At the outset, we note that § 107 "requires a case-by-case determination whether a particular use is fair." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549 (1985). Furthermore, fair use is a mixed question of law and fact, id. at 560, and thus the district court's conclusion on this point is open to full review on appeal. See Puma Indus. Consulting, Inc. v. Daal

Assocs., Inc., 808 F.2d 982, 986 (2d Cir. 1987). And, "[w]here the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding,' " but may resolve the issue of fair use as a matter of law. Harper & Row, 471 U.S. at 560 (quoting Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985)).

In addition, the structure of § 107 is significant. The section is entitled "Limitations on exclusive rights: Fair use," and the opening sentence makes clear that a "fair use . . . is not an infringement of copyright." The same sentence furnishes examples of broad categories of fair use: "criticism, comment, news reporting, teaching . . . , scholarship or research." The section then defines four non-exclusive factors to be considered in determining whether a particular use is fair.

We have quite recently applied the doctrine of fair use in two opinions of this court. See Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987); New Era Publications Int'l, ApS v. Henry Holt & Co., 873 F.2d 576 (2d Cir.), petition for reh'g denied, 884 F.2d 659 (2d Cir. 1989), cert. denied, 110 S. Ct. 1168 (1990). Since the decisions in *Salinger* and *New Era*, there have been a number of articles on the subject of fair use. See, e.g., Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harv. L. Rev. 1137 (1990). Indeed, several of the articles have been written by some of the judges involved in those decisions. See Oakes, Copyrights and Copyremedies: Unfair Use and Injunctions, to be published in a forthcoming edition of the Hofstra L. Rev.; Leval, Commentary: Toward a Fair Use Standard, 103 Harv. L. Rev.

1105 (1990); Miner, Exploiting Stolen Text: Fair Use or Foul Play?, 37 J. Copyright Soc'y 1 (1989); Newman, Not the End of History: The Second Circuit Struggles with Fair Use, 37 J. Copyright Soc'y 12 (1989). Some of these articles are highly critical of the state of the law with respect to the fair use doctrine and offer suggestions for improvement. But, our task is to apply as best we can the teachings of the governing precedents as we understand them. In doing so, on the facts before us and under the appropriate wide-ranging standard of review, we conclude that all four factors listed in § 107 favor appellant, and that appellant's use was fair.

A. *Factor One: Purpose and Character of the Use*

As noted above, the book is an unfavorable biography. Section 107 provides that use of copyrighted materials for "purposes such as criticism, . . . scholarship, or research, is not an infringement of copyright." Our cases establish that biographies in general, and critical biographies in particular, fit "comfortably within" these statutory categories "of uses illustrative of uses that can be fair." Salinger, 811 F.2d at 96; see also New Era, 873 F.2d at 583.

Citing Harper & Row, 471 U.S. at 561, appellee argues that there is no rule that if an allegedly infringing work is a biography, factor one necessarily operates in the biographer's favor in evaluating whether there has been a "fair use." Nevertheless, "[i]f a book falls into one of these categories [i.e., criticism, scholarship or research], assessment of the first fair use factor should be at an end." New Era, 884 F.2d at 661 (Miner, J., concurring in the denial of rehearing in banc). True, the Supreme Court in *Harper & Row* did not end its analy-

sis of factor one once it had determined that the allegedly infringing use (news reporting) was listed in § 107 as an example of fair use. See 471 U.S. at 561-63. However, what the Court went on to consider was the infringer's knowing exploitation of the copyrighted material—obtained in an underhanded manner—for an undeserved economic profit. See id. at 562-63. The present case, by contrast, does not involve "an attempt to rush to the market just ahead of the copyright holder's imminent publication, as occurred in *Harper & Row*." Salinger, 811 F.2d at 96. Instead, as the author explained in detail in an affidavit submitted below, discussing the reason why he included each quote, the author uses Hubbard's works for the entirely legitimate purpose of making his point that Hubbard was a charlatan and the Church a dangerous cult. To be sure, the author and appellant want to make a profit in publishing the book. But the author's use of material "to enrich" his biography is protected fair use, "notwithstanding that he and his publisher anticipate profits." Id.

Appellee also contends that the book's use of Hubbard's works does not serve any fair use purpose, but was rather unnecessary appropriation of Hubbard's literary expression. We do not agree with this characterization. The author uses the quotations in part to convey the facts contained therein, and not for their expression. More importantly, even passages used for their expression are intended to convey the author's perception of Hubbard's hypocrisy and pomposity, qualities that may best (or only) be revealed through direct quotation. The book "is not merely the product of 'the facile use of the scissors,' " Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1260 (2d Cir. 1986) (quoting Folsom v. Marsh,

9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901) (Story, J.)), cert. denied, 481 U.S. 1059 (1987). Appellee points particularly to the 17 topic quotations that begin many of the chapters; while a few of these may arguably come close to the line separating critical study from appropriation, most do not. Indeed, even this borderline use appears to serve the author's purpose by juxtaposing the grandiose expression of the quotations with the banal (to the author) material contained in the body of the chapter. Moreover, the topic quotations sometimes serve to explain or to summarize matters discussed in the chapter.

Appellee further argues that *New Era* explicitly held that copying for purposes of demonstrating character defects cannot amount to fair use. This is simply a misreading of *New Era*. The passage that appellee cites in support of its interpretation, 873 F.2d at 583, does not reject the idea that quotation in a biography to demonstrate character flaws may be fair use. Rather, the passage rejects the claim that the purpose of the use entitles it to "special consideration." Id.; see also New Era, 884 F.2d at 660-61 (Miner, J., concurring in the denial of rehearing in banc). The panel in *New Era*, however, observed that "[a]s long as a book can be classified as a work of criticism, scholarship or research, as can the book here, the factor cuts in favor of the book's publisher, whether the copyrighted matter is taken from a literary lion like J.D. Salinger or a purported prophet like L. Ron Hubbard." New Era, 873 F.2d at 583.

We hold that factor one favors appellant.

B. *Factor Two: Nature of the Copyrighted Work*

The district court found that all of the works from which the author quoted had been published. 729 F. Supp. at 998. Whether or not a work is published is critical to its nature under factor two, because "the scope of fair use is narrower with respect to unpublished works." Harper & Row, 471 U.S. at 564; see also New Era, 873 F.2d at 583; Salinger, 811 F.2d at 96. Thus, "even substantial quotations might qualify as fair use in a review of a published work." Harper & Row, 471 U.S. at 564.

Furthermore, the scope of fair use is greater with respect to factual than non-factual works. See id. at 563. While there is no bright-line test for distinguishing between these two categories, we have referred to the former as works that are "essentially factual in nature," Maxtone-Graham, 803 F.2d at 1263, or "primarily informational rather than creative," Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983), cert. denied, 469 U.S. 823 (1984). We have some hesitation in trying to characterize Hubbard's diverse body of writings as solely "factual" or "non-factual," but on balance, we believe that the quoted works—which deal with Hubbard's life, his views on religion, human relations, the Church, etc.—are more properly viewed as factual or informational.

Appellee emphasizes, however, that there is no per se rule under *Harper & Row*, *New Era* and *Salinger* that factor two favors an alleged infringer whenever the works quoted from are published, as appellant appears to suggest. Appellee is, of course, correct that there is no rule that one may copy with absolute impunity from a published work, regardless of the amount taken.

Otherwise, the copyright law would be a nullity. Nevertheless, Hubbard's works have been published, and "[b]iographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works." Maxtone-Graham, 803 F.2d at 1263 (quoting Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967)).

Appellee also contends that *Harper & Row* did not endorse greater copying from published works, arguing that in *Salinger*, we interpreted *Harper & Row* to mean only that the likelihood "that copying will be found to be a fair use is diminished when the copyrighted material is unpublished, not that a greater quantity of copying of published works is permitted." Appellee fails to persuade us, however, that the plain language of the Supreme Court in *Harper & Row*—i.e., "even substantial quotations might qualify as fair use in a review of a published work," 471 U.S. at 564—should be disregarded. Furthermore, even assuming that appellee's characterization of *Salinger*'s gloss on this passage is correct, appellee advances no persuasive reason why a court should be less, rather than more, likely to find fair use when, as here, the copyrighted material has been published.

In addition, appellee argues that *Harper & Row* intended to allow liberal quotation only for the purpose of literary criticism or review of published works, and that the book does not purport to analyze the literary worth of Hubbard's works. But, we regard appellee's attempt to limit *Harper & Row* to literary criticism as entirely too literal-minded, particularly in the face of

our cases holding that biographies are considered works of criticism, scholarship or research within the meaning of § 107. See, e.g., Salinger, 811 F.2d at 96.

Appellee further asserts that many of the quoted passages are more creative or expressive than factual, and that *Maxtone-Graham* is not relevant here because that case involved "standard social science source materials"—i.e., quotations drawn from published interviews. We agree, as already indicated, that there is no easy distinction between works that are "factual" on the one hand, and "creative" or "expressive" on the other, because " '[c]reation of a nonfiction work, even a compilation of pure fact, entails originality.' " Maxtone-Graham, 803 F.2d at 1262-63 (quoting Harper & Row, 471 U.S. at 547). Thus, reasonable people can disagree over how to classify Hubbard's works. Nevertheless, although some of the quoted passages can accurately be described as expressive—e.g., Hubbard's poetry—our review of the record persuades us that most simply cannot be so characterized.

Finally, appellee distinguishes *Maxtone-Graham*, rightly noting that case involved quotations from "a collection of verbatim interviews," which the district court there described as " 'essentially reportorial in nature.' " Maxtone-Graham, 803 F.2d 1262. Nevertheless, we see nothing in that case indicating that the panel intended its discussion of factor two to be limited to situations involving such interviews. Indeed, the panel drew its discussion of factor two from an earlier case dealing with biographies, Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

We conclude that factor two favors appellant.

C. Factor Three: Volume of Quotation

Factor three addresses the amount and substantiality of the portion used in relation to the copyrighted work, not to the allegedly infringing work. Harper & Row, 471 U.S. at 564-65. "There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use." Maxtone-Graham, 803 F.2d at 1263. This factor has both a quantitative and a qualitative component, so that courts have found that use was not fair where the quoted material formed a substantial percentage of the copyrighted work, see, e.g., Salinger, 811 F.2d at 98 (factor three favors copyright holder where one-third of 17 letters and 10% of 42 letters used) or where the quoted material was " 'essentially the heart of' " the copyrighted work. Harper & Row, 471 U.S. at 565 (quoting the district court opinion in that case, 557 F. Supp. at 1072).

Here, the book uses overall a small percentage of Hubbard's works. Appellant calculates that the book quotes only a minuscule amount of 25 of the 48 works that appellee claimed were infringed, 5-6% of 12 other works and 8% or more of 11 works, each of the 11 being only a few pages in length. (Appellee has accepted these figures "for purposes of discussion," although it adds that they may understate the true amount taken.) In the context of quotation from published works, where a greater amount of copying is allowed, see Harper & Row, 471 U.S. at 564, this is not so much as to be unfair. Cf. Maxtone-Graham, 803 F.2d at 1263 (inclusion of 4.3% of published copyrighted work "is not incompatible with a finding of fair use"); Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 61-62 (2d Cir. 1980) (fair use

defense not available where broadcast was made containing 8% of a videotape that apparently had never been broadcast before).

Nor is the use qualitatively unfair. Appellee asserts that "key portions" of Hubbard's works are taken "[i]n many cases." But the district court found that the quotations in the book's text—which amount to the bulk of the allegedly infringing passages—do not take essentially the heart of Hubbard's works. 729 F. Supp. at 1000. And our review of the remaining 17 passages, which are "set off by themselves at the beginning of a part or chapter" and "set the tone for the sections they precede," id. at 996, persuades us that they too do not take essentially the heart of Hubbard's works.

Appellee also argues that factor three weighs in its favor because the quotations are an important ingredient *of the book*, pointing out that 2.7% of the book is made up of quotations from Hubbard's works.[3] Appellee asserts that, because of the length of Hubbard's works and because so many of his writings were quoted from, it would be of little value to focus on the amount of infringing material in relation to the copyrighted works, and cites various cases—e.g., Harper & Row, 471 U.S. at 566; Salinger, 811 F.2d at 98-99; Meeropol v. Nizer, 560 F.2d 1061, 1070-71 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978)—in which courts discussed the amount used in relation to the infringing work, not the infringed work.

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3 Appellant puts the sum at 2.4% or 2.9%. The difference, however, is not significant to our reasoning, and we will use appellee's figure for the purpose of our discussion.

We do not agree with appellee's argument. Section 107 plainly commands us to consider "the amount and substantiality of the portion used in relation to *the copyrighted work* as a whole" (emphasis added), and contains no exception for lengthy works or quotations from multiple works. Furthermore, to the extent that courts have looked to the infringing work, the use here is not as significant as the use alleged in those cases. In *Salinger*, for example, the quoted materials "[t]o a large extent . . . ma[de] the book worth reading." 811 F.2d at 99; see also Harper & Row, 471 U.S. at 565-66 (quotes constituted 13% of the infringing work and played a "key role" in it); Meeropol, 560 F.2d at 1070-71 (quoted material figured prominently in the promotional work for the book). By contrast, the use of the quotes here is primarily a means for illustrating the alleged gap between the official version of Hubbard's life and accomplishments, and what the author contends are the true facts. For that purpose, some conjuring up of the copyrighted work is necessary. Cf. Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490, 497 (2d Cir. 1989) (trademark case; parody "must to some extent resemble the original").

We find that factor three favors appellant.

D. *Factor Four: Effect on the Market*

Factor four of § 107 concerns the "effect of the use upon the potential market for or value of the copyrighted work." According to the Supreme Court, this "is undoubtedly the single most important element of fair use." Harper & Row, 471 U.S. at 566 (footnote omitted). In evaluating this factor, courts do not focus

solely on the market for the work itself, but also on the "harm to the market for derivative works." Id. at 568.

Appellee argues strenuously that factor four favors it, asserting that it intends to publish an authorized biography of Hubbard that will include excerpts from all of his works, including material as yet unpublished, and that the book will discourage potential readers of the authorized biography by conveying the flavor of Hubbard's writings. Appellee also contends that *New Era* leaves us no choice but to rule in its favor on factor four; according to appellee, that case held that publication of a similar unfavorable biography would impair the market for, and compete with, its planned biography of Hubbard.

We do not find either argument persuasive. As to the first, we found it "unthinkable" in *Maxtone-Graham* that potential customers for plaintiff's copyrighted book containing a "series of sympathetic interviews on abortion and adoption" would fail to purchase plaintiff's book because a small portion of it was used in an essay sharply critical of abortion. 803 F.2d at 1264. Similarly, we are skeptical here that potential customers for the authorized *favorable* biography of Hubbard in the future will be deterred from buying because the author's *unfavorable* biography quotes from Hubbard's works. Indeed, it is not "beyond the realm of possibility that" the book "might stimulate further interest" in the authorized biography. Id.

Furthermore, even assuming that the book discourages potential purchasers of the authorized biography, this is not necessarily actionable under the copyright laws. Such potential buyers might be put off because the book persuaded them (as it clearly hopes to) that Hub-

bard was a charlatan, but the copyright laws do not protect against that sort of injury. Harm to the market for a copyrighted work or its derivatives caused by a "devastating critique" that "diminished sales by convincing the public that the original work was of poor quality" is not "within the scope of copyright protection." Consumers Union, 724 F.2d at 1051 (footnote omitted). This is so because the critique and the copyrighted work serve "fundamentally different functions, by virtue" of, among other things, "their opposing viewpoints." Maxtone-Graham, 803 F.2d at 1264. "Where the copy does not compete in any way with the original," copyright's central concern—"that creation will be discouraged if demand can be undercut by copiers"—is absent. Consumers Union, 724 F.2d at 1051; see also 3 Nimmer on Copyright, § 13.05[B], at 13-90.1 to -90.3 (1989). Here, the purpose of the book is diametrically opposed to that of the authorized biography; the former seeks to unmask Hubbard and the Church, while the latter presumably will be designed to promote public interest in Hubbard and the Church. Thus, even if the book ultimately harms sales of the authorized biography, this would not result from unfair infringement forbidden by the copyright laws, but rather from a convincing work that effectively criticizes Hubbard, the very type of work that the Copyright Act was designed to protect and encourage.

Nor do we believe that *New Era* compels a contrary result. At the outset, we note that the panel in *New Era* did not address in this context the point we have just made, that is, a critical biography serves a different function than does an authorized, favorable biography, and thus injury to the potential market for the favorable biography by the publication of the unfavorable biogra-

phy does not affect application of factor four. See 873 F.2d at 583. Beyond that, however, *New Era* involved the publication of previously unpublished material, "particularly from [Hubbard's] early diaries and journals." Id. at 578-79. Arguably, then, the unfavorable biography in *New Era* threatened economic harm to the authorized biography, even though it fulfilled a different function, because it contained material whose market value (1) had not yet been realized by the copyright holder, and (2) might be entirely misappropriated by the infringing publication. Here, by contrast, the works quoted from are all published, and the book will not tap any sources of economic profit that would otherwise go to the authorized biography. Cf. Harper & Row, 471 U.S. at 562, 567-68 (unpublished work; actual damage of $12,500 shown, and infringing work intended to scoop publication of copyrighted work); Salinger, 811 F.2d at 99 (unpublished letters; infringing work "copies virtually all of the most interesting passages of the letters").

We conclude that factor four favors appellant.

E. *Other Factors*

The factors enumerated in § 107 "are not meant to be exclusive," Harper & Row, 471 U.S. at 560, and we have looked to such additional considerations as "bad faith by the user of copyrighted material [that] suggests unfairness," Maxtone-Graham, 803 F.2d at 1264, or "prejudice suffered by [the alleged infringer] as the result of [the copyright holder's] unreasonable and inexcusable delay in bringing the action." New Era, 873 F.2d at 584. Although appellee argues that the book's use of passages from Hubbard's works was "predatory"

rather than fair, we simply do not agree with this characterization, and find that there are no additional factors suggesting unfairness.

In sum, balancing all of the relevant factors, we believe that the present case presents a strong set of facts for invoking the fair use defense: The book is a critical biography, designed to educate the public about Hubbard, a public figure who sought public attention, albeit on his own terms; the book quotes from merely a small portion of Hubbard's works and from only those that have been published; and, it will cause no adverse impact protected by the copyright law on the market for Hubbard's writings. In these circumstances, we conclude that the book's use of passages from Hubbard's work is protected fair use.

2. *HCO Manual of Justice*

On its cross-appeal, appellee argues that the district court erred in ruling that the *HCO Manual of Justice*—18 passages from which are quoted in the book—had been published in 1959 and that its copyright had expired. Appellee asserts that the *HCO Manual* was subject only to "limited" publication in 1959; that the copyright notice appearing in the work—"COPYRIGHT (C) 1959 by L. Ron Hubbard All Rights Reserved"—was incorrect and superfluous because the book was not published; and that the book did not come under federal copyright protection until January 1, 1978, the effective date of the 1976 Copyright Act.

We are not persuaded by these arguments, which, according to appellant, were not raised below. The district court's finding that the *HCO Manual* was published in 1959 is supported by evidence placed in the

record by appellee itself, in particular, an affidavit stating, among other things, that the *HCO Manual* was published. Although appellant argues that this was a simple error caused by the speedy nature of the proceedings below, this assertion cannot properly be raised for the first time in this court.

Since the *HCO Manual* was published in 1959, there is no question that its copyright expired in 1987. Under 17 U.S.C. § 304(a), any copyright that was in its first term on January 1, 1978 "shall endure for twenty-eight years from the date it was originally secured." The date that the copyright of the *HCO Manual* was "originally secured" is governed by the provisions of the 1909 Copyright Act. See 2 Nimmer on Copyright, § 7.02[C][1], at 7-13 to -14 (1989). Under § 10 of the 1909 Act, an author "secure[d] copyright for his work by publication thereof with the notice of copyright," 1909 Act § 10, reprinted in 1990 supp. to 17 U.S.C.A., at 333, and § 19 of that Act specified that the notice of copyright "shall include also the year in which the copyright was secured by publication." Id. § 19, reprinted in 1990 supp. to 17 U.S.C.A., at 335. Here, the *HCO Manual*'s copyright notice states 1959 as the copyright date; thus, the *HCO Manual*'s copyright lasted for 28 years from 1959, 17 U.S.C. § 304(a), and expired in 1987.

Conclusion

We hold that each of the four factors of § 107 favors appellant, and that the book's use of quotations from Hubbard's published works was protected fair use. We also hold that the district court did not err in finding

that the copyright on the *HCO Manual* expired in 1987. We thus reverse the judgment of the district court, except to the extent it concludes that the copyright on the *HCO Manual* expired in 1987, as to which we affirm.

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

89 Civ. 3845 (LLS)

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Plaintiff,

—against—

CAROL PUBLISHING GROUP and
JONATHAN CAVEN-ATACK,

Defendants.

OPINION AND ORDER

Plaintiff New Era Publications International ("New Era") moves pursuant to Fed. R. Civ. P. 65 to enjoin defendants Carol Publishing Group ("Carol") and Jonathan Caven-Atack[1] from publishing an unauthorized biography of the late L. Ron Hubbard.

BACKGROUND

New Era is the exclusive licensee of the works of Mr. Hubbard, a prolific and controversial author and founder of the Church of Scientology (the "Church"). Mr. Hubbard, who died in 1986, has written books on such diverse topics as science fiction, philosophy and religion. New Era has gone to considerable lengths to protect the copyrights to Mr. Hub-

1 Mr. Atack has not been served with a summons and complaint in this action, nor has he entered an appearance. (Affirmation of Jonathan Caven-Atack dated September 29, 1989 ¶ 2).

bard's works, instituting suits in the United States, England, Canada and Australia.

Mr. Atack is the author and Carol is the publisher of *A Piece of Blue Sky* (the "book"), a critical biography of Mr. Hubbard. Mr. Atack was a member of the Church for almost nine years, during which he spent a great deal of time, money and effort studying Church teachings and pursuing its ideals. (Affirmation of Jonathan Caven-Atack dated September 29, 1989 ("Atack Aff.") Exhibit A at 1).

Mr. Atack became disillusioned with the Church after discovering what he perceived to be abusive practices against dissident Church members. (*Id.* at 1-2). After a thorough investigation, Mr. Atack came to believe that Scientology is a dangerous cult and that Mr. Hubbard, far from being the gentle prophet portrayed in Church literature, was a paranoid, vindictive and profoundly disturbed man. (*Id.* at 2-5). He wrote the book to expose what he believes to be the pernicious nature of the Church and the deceit that is the foundation of its teachings. (*Id.* at 6-7).

New Era learned that Carol intended to publish the book and, having reason to believe that it would contain copyrighted materials, New Era brought this action to prevent its publication. (Affidavit of Jonathan Lubell sworn to September 14, 1989 ¶ 3, 4 & 11). Over its objection, Carol was ordered to produce the manuscript of the book to New Era. Review of the manuscript disclosed substantial quotation from copyrighted material and New Era moved for a preliminary injunction. The parties subsequently agreed to merge the proceedings for preliminary and permanent injunctions pursuant to Fed. R. Civ. P. 65(a)(2).

According to New Era, 121 passages of the book are taken from 48 copyrighted sources. (Affidavit of Kenneth Long sworn to September 14, 1989 ("First Long Aff.") ¶ 8 & Exhibit A; Affidavit of Kenneth Long sworn to October 17, 1989 ("Second Long Aff.") ¶ 3). These passages total 4,324 words, which is approximately 2.9% of the total words in the

book.[2] (First Long Aff. ¶ 8). New Era asserts that two of the passages, totalling 33 words, are from unpublished materials, although Carol contends that these materials have been published. Carol also claims that some of the works allegedly infringed by the book are, for various reasons, not appropriate subjects for a copyright action.

New Era asserts, as it has in another action to enjoin a biography of Mr. Hubbard, that it has been authorized to publish a biography of Mr. Hubbard that will draw from both his published and unpublished writings. (Affidavit of Carl Heldt sworn to September 14, 1989 ("Heldt Aff.") ¶ 7); *New Era Publications Int'l v. Henry Holt and Co.*, 695 F. Supp. 1493, 1522 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989). It contends that publication of the book will seriously impair the market for this biography. (Heldt Aff. ¶ 7).

New Era asserts that publication of the biography would infringe on the copyright of Mr. Hubbard's works in violation of 17 U.S.C. ¶¶ 106, 501 (1988). Carol contends that the use of the copyrighted materials is protected by the "fair use" privilege embodied in 17 U.S.C. ¶ 107.[3]

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2 New Era arrived at this figure by counting the words on each of the first ten pages following the book's introduction to determine the average number of words per page. It then multiplied this figure by the number of pages in the book, resulting in an estimate of 147,000 words in the book. (First Long Aff. ¶ 5).

New Era has prepared a schedule comparing each of the copyrighted materials in the book with the Hubbard quotation from which it was taken. (*See id.* ¶ 6 & Exhibit A). New Era asserts that in making its calculation of the total number of words Mr. Atack takes from copyrighted materials, it has only counted those words that are quoted or are closely paraphrased. (Second Long Aff. ¶ 7).

3 Section 107 states:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

DISCUSSION

I. Validity of Certain Copyrights

Carol contends that New Era has not submitted proof of registration of six works, representing nine of the passages that New Era claims come from copyrighted sources. (Defendant's Supplemental Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction at 2).[4] "Registration of a copyright claim is a jurisdictional prerequisite to a suit for infringement." *Wales Industrial, Inc. v. Hasbro Bradley. Inc.*, 612 F. Supp. 510, 515 (S.D.N.Y. 1985) (footnote omitted). However, New Era has demonstrated that it has registered these six works. (*See* Affidavit of Kenneth Long sworn to November 2, 1989 ("Third Long Aff.") ¶ 4).[5]

Carol also contends that the copyright of one of the materials, the *HCO Manual of Justice*, (the "*Manual*") has expired. The *Manual* contains 18 of the allegedly infringing passages, totalling approximately 389 words. Carol contends

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(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. ¶ 107.

4 Carol originally asserted that New Era had not provided proof of registration for other copyrights that the book would allegedly infringe. (*See* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction at 8). New Era filed an amended complaint establishing registration of these materials.

5 Carol has also asserted that some of the claimed copyrights are invalid because they were filed by the executor of Mr. Hubbard's estate and there is no showing that the executor has authority to act with regard to these works. However, New Era has demonstrated the executor's authority with respect to Mr. Hubbard's literary property. (*See* Third Long Aff. ¶ 2 & Exhibit A).

New Era has also demonstrated that several copyrights are valid even though they were registered in Mr. Hubbard's name after his death. (*See* Third Long Aff. Exhibit 3).

that because the *Manual* was published in 1959, the 28-year copyright term provided for in the Copyright Act of 1909[6] (the "1909 Act") expired in 1987.

The Copyright Act of 1976 (the "1976 Act") states that any copyright that was in its first term on January 1, 1978 "shall endure for twenty-eight years from the date it was originally secured." 17 U.S.C. § 304(a). Under section 10 of the 1909 Act, an author secured a copyright by publishing a work with a copyright notice. Section 19 required that the copyright notice indicate the year in which the copyright was secured by publication. The copyright notice in the *Manual* indicates that it was published in 1959, although the work was not registered until September 14, 1989. (Affirmation of Melvin Wulf dated October 24, 1989 Exhibit A).

New Era states that the copyright has not expired because, the copyright notice notwithstanding, the *Manual* is unpublished. (Third Long Aff. ¶ 5). Under section 26 of the 1909 Act, the date of publication is the date when copies are "placed on sale, sold, or publicly distributed." New Era notes that there is a blank in its copyright application in the space provided for the date of publication and the registration form states that the date of publication is to be included "ONLY if this work has been published." (First Verified Amended Complaint Exhibit B-54 (emphasis in original)).

However, New Era had previously asserted that the work is published. (Heldt Aff. ¶ 4). New Era fails to offer an explanation for the date on the copyright notice or its earlier assertion that the *Manual* is published. Because the *Manual* was published with a copyright notice in 1959, its copyright expired in 1987. Accordingly, that work is no longer entitled to copyright protection and the passages from it contained in the book will not be considered in determining New Era's claim of infringement. *See Harvey Cartoons v. Columbia Pictures Industries, Inc.*, 645 F. Supp. 1564, 1571 (S.D.N.Y. 1986).

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6 The Copyright Act of 1909 was repealed and replaced with the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

II. Fair Use

The book takes many passages from copyrighted sources. It infringes New Era's copyright unless copying the passages is a fair use. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 569 (1985) (defendant conceded that its quotation of 300 words was infringement "unless excused as a fair use.").

The privilege of fair use, a common-law doctrine codified in section 107 of the 1976 Act, allows a reasonable use of copyrighted materials without the consent of the owner. *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, Law of Copyright and Literary Property 260 (1944)). The nature of the privilege is summed up in Justice Story's classic statement of the doctrine:

> [A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901) (cited in *Harper & Row*, 471 U.S. at 550). Section 107 was intended merely to codify the common law doctrine, not to modify it. *See Harper & Row*, 471 U.S. at 549.

Section 107 allows the fair use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. It sets out four nonexclusive factors used to determine whether a use is fair: (1) the purpose and character of the use, including whether it is being published for profit; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used compared to the copyrighted work as a whole; and (4) the effect on the potential market of the copyrighted work. *Id.*

A. The Purpose and Character of the Use

Carol's potential profit from its use of copyrighted materials "tends to weigh against a finding of fair use." *Harper & Row*, 471 U.S. at 562. Yet the mere fact that a work may produce pecuniary gain for its author or publisher is not dispositive of a claim of fair use. *See Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987). Such an absolute rule would severely restrict the operation of the fair use doctrine, as virtually all publications involve some profit motive. *Ibid.* Thus the Second Circuit has stated when previously analyzing a claim of fair use by a biographer of Mr. Hubbard that "[a]s long as a book can be classified as a work of criticism, scholarship or research, as can the book here, the factor cuts in favor of the book's publisher." *New Era*, 873 F.2d at 583. As this general statement suggests, the overall purpose and character of the use of copyrighted materials in the book tends to favor a finding of fair use.

However, many of the specific uses of copyrighted materials serve no fair use purpose. *See Craft v. Kobler*, 667 F. Supp. 120, 126 (S.D.N.Y. 1987) (analysis of purpose and character of use calls for examination of how the particular taking of protected material serves the instructive goals that the fair use doctrine seeks to promote."). Passages from copyrighted works are often set off by themselves at the beginning of a part or chapter. (*See* First Long Aff. Exhibit A, passages 1, 2, 5-6, 9, 21, 34, 39, 51-52, 75, 85, 102, 107, 109-110, 119). The evident purpose of this device, which is carried out with some effect, is to use passages from Mr. Hubbard's work to set the tone for the sections they precede. In essence, these passages use copyrighted materials as a literary device rather than as a basis for a critical study of Mr. Hubbard. They therefore serve a very weak fair use purpose. *Cf. Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (although not determinative, productive nature of use "may be helpful in calibrating the balance" of fair use).

For example, the following quotation from Mr. Hubbard's poem *Hymn of Asia* precedes a section about his early life:

> Appoint Amongst you
> Some small few
> To tell about me lies
> And invent wicked Things
> And spread out infamy
> Abroad and Within
> And to stand before
> Our altars
> And insult and
> Lie and tell
> Evil rumors about us all.

(First Long Aff. Exhibit A, passage 5).

Mr. Atack states that the purpose of this quotation is to show "Hubbard's concern, and indeed paranoia, that he would be misrepresented." (Atack Aff. Exhibit B, ¶ 5). However, Mr. Atack does not analyze this quotation and what it reveals about Mr. Hubbard. No comment or criticism is directed at it. The passage is merely set forth, for readers to make of it what they will. The quotation itself is gratuitous: whatever illuminating effect its presence may give from mere juxtaposition, that effect rests on copyright infringement since it is put to no "use." Rather, the passage serves only as a backdrop for the section which follows it. Such quotations reproduce the work of Mr. Hubbard, rather than serve the scholarship, criticism, comment or research of Mr. Atack; thus their use is essentially predatory rather than fair. *See Maxtone-Graham*, 803 F.2d at 1260 (" '[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not the facile use of the scissors' " (citing *Folsom*, 9 F. Cas. at 345)).

Similarly, the book contains the following quotation: "All that Ethics [sic] is for . . . is simply that additional tool necessary to make it possible to apply the technology of Scientology. Man does not have that purpose for his law or his justice. He wants to squash people who are giving him trouble." (First Long Aff. Exhibit A, passage 109 (omission

in Atack book)). This quotation precedes a section of the book that details Mr. Hubbard's alleged use of lawsuits to obstruct and harass those who opposed him, and is followed immediately by another substantial quotation set off as a chapter heading.

The use of such quotations cannot be justified as "ironic" (Atack Aff. Exhibit B, ¶ 109), or as demonstrating, without further comment, Mr. Hubbard's paranoia (*id.* ¶ 5). The effect is that Mr. Hubbard's expressions frame and inspire Mr. Atack's book: to this extent it is Mr. Hubbard, not Mr. Atack who is the author of the book, and that is not fair use but infringement.

Nor are other uses of copyrighted materials warranted. Some of the quotations of Mr. Hubbard's factual accounts do not contribute to the accuracy of the book or otherwise serve a fair use purpose. (*See* First Long Aff. Exhibit A, passages 7, 10, 18). For example, the book quotes the following: "In the isolation of the high hills of Tibet, even native banditis responded to Ron's honest interest in them and were willing to share with him what understanding of life they had." (*Id.* passage 10). The avowed purpose of this quotation is to show falsehood, because Mr. Hubbard was never in Tibet. (Atack Aff. Exhibit B, ¶ 10). Clearly, Mr. Atack could made that simple point by using only the facts and not the ebullient verbiage of Mr. Hubbard's passage. *See Salinger*, 811 F.2d at 96-97.

Mr. Atack quotes the following passage:

> Blinded with injured optic nerves, and lame with physical injuries to hip and back, at the end of World War II, I faced an almost nonexistent future. My Service record stated: "This officer has no neurotic or psychotic tendencies of any kind whatsoever," but it also stated "permanently disabled physically."
>
> And so there came a further blow—I was abandoned by family and friends as a supposedly hopeless cripple and a probable burden upon them for the rest of my days. I yet worked my way back to fitness and strength in less than two years, using only what I knew about Man and

> his relationship to the universe. I had no one to help me; what I had to know I had to find out. And it's quite a trick studying when you cannot see.
>
> I became used to being told it was all impossible, that there was no way, no hope. Yet I came to see again and walk again.

(First Long Aff. Exhibit A, passage 18). Mr. Atack's explanation for using this quotation is that it is false. (Atack Aff. Exhibit B, ¶ 1). While facts may be conveyed in this passage, its effect is to appropriate Mr. Hubbard's grandiose and extravagant expressions. For the limited purpose of challenging the "facts" in it, Mr. Atack could have stated the substance of Mr. Hubbard's assertions. *See Salinger*, 811 F.2d at 96 (biographer could have copied only facts to avoid injunction). The result might have been a colorless sentence indeed, but (under Second Circuit precedent which controls this court) an author "is not at liberty to avoid 'pedestrian' reportage by appropriating his subject's literary devices." *Id.* at 97.

In sum, many of the passages lack any allowable fair use purpose. They often are only used as topic headings, as signals in Mr. Hubbard's words of the subject Mr. Atack will next address. That is not a fair use but an appropriation. To that extent the purpose and nature of the use strongly favors New Era.

B. The Nature of the Copyrighted Work

1. Published and Unpublished Sources

New Era claims that two of the passages are from unpublished materials. The scope of the fair use privilege is much narrower with regard to such materials. *See Harper & Row*, 471 U.S. at 564; *Salinger*, 811 F.2d at 97. However, Carol has demonstrated that both passages come from published sources. One of the passages appeared in a newspaper article in 1984. (*See* Atack Aff. ¶ 7, Exhibit D). The other appeared in Mr. Hubbard's book, *What is Scientology*. (*Id.* at ¶ 8).

2. Factual and Creative Materials

"Facts cannot be copyrighted." *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983) (citing 17 U.S.C. § 102(b)), *cert. denied*, 469 U.S. 823 (1984). When a copyrighted work is factual, others may quote it more liberally. *Harper & Row*, 471 U.S. 563. In such cases quotation can be necessary "adequately to convey the facts." *Ibid.*

A biography by definition purports to be a factual account, and many of the allegedly infringing passages are from statements Mr. Hubbard contended were historical facts. (*See, e.g.*, First Long Aff. Exhibit A, passages 8-9, 11-17, 50, 77-78, 87, 89, 95). Many of these passages relate to the account of Mr. Hubbard's travels as a young man and his participation in the Second World War. Mr. Atack contrasts them to his own version of events, and therefore some verbatim quotation is necessary for accuracy.

Mr. Atack uses other quotations to expound Mr. Hubbard's scientific theories. (*See, e.g., id.*, passages 22-25, 31-32, 38, 43, 49, 79). For example, Mr. Hubbard asserted that a person who followed his teachings and attained the status of a "Clear" could do a computation which a "normal [person] would do in half an hour, in ten or fifteen seconds." (*Id.*, passage 23). Quotation of such factual assertions is entitled to broad fair use protection. *See Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir.) (plurality opinion), *cert. denied*, 110 S. Ct. 219 (1989); *Maxtone-Graham*, 803 F.2d at 1263-64.

However, many of the passages in the book are from Mr. Hubbard's creative and philosophical writings. (*See e.g.*, First Long Aff. Exhibit A, passages 1-2, 6, 21, 33, 41, 51, 54, 75, 84-85, 109, 113, 117).[7] Most of these quotations are not necessary to assure accuracy. Instead, they are used for their expressive content.

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7 Not all of the passages from copyrighted sources have been categorized here as factual or creative. Much of his work does not lend itself to such neat characterization. (*See, e.g.*, First Long Aff. Exhibit A, passage 3).

For example, Mr. Atack quotes the following:

> The hardest task one can have is to continue to love one's fellows despite all the reasons he should not . . .
>
> A primary trap is to succumb to invitations to hate. There are those who appoint one their executioners. Sometimes for the sake of the safety of others, it is necessary to act, but it is not necessary also to hate them.

(*Id.* passage 84) (omission in Atack book). Mr. Atack describes this statement as hypocritical. (Atack Aff. Exhibit B ¶ 84). However, the passage is essentially expressive rather than factual, and the nature of the passage weighs against a finding that its use is fair.

Mr. Atack also appropriates Mr. Hubbard's expression in the following passage: "My purpose is to bring a barbarism out of the mud it thinks conceived it and to form, here on Earth, a civilization based on human understanding, not violence. That's a big purpose. A broad field. A star-high goal. But I think it's your purpose, too." (First Long Aff. Exhibit A, passage 2). Mr. Atack uses this passage to demonstrate "the false public face of Scientology." (Atack Aff. Exhibit B ¶ 2).

The use of the first sentence of this passage is arguably necessary to relate accurately the professed purpose of Scientology, and to that extent the quotation is factual. However, the remainder of the quotation appropriates Mr. Hubbard's expression about these purposes and is superfluous to a factual discussion of them.

Similarly, Mr. Atack quotes the following passage:

> It is definitely none of my business how you apply these techniques. I am no policeman ready with boards of ethics and court warrants to come down on you with a crash simply because you are 'perverting Scientology.' If there is any policing to be done, it is by the techniques themselves, since they have in themselves a discipline brought about by their own power. All I can do is put into your hands a tool for your own use and then help you use it.

(First Long Aff. Exhibit A, passage 54). This passage contains several factual assertions by Mr. Hubbard. However, Mr. Atack uses the entire quotation, rather than culling the facts from the expressive materials in which they are contained.

Because these and so many other quoted passages are expressive rather than factual materials, this factor favors New Era. *See Harper & Row*, 471 U.S. at 563-64 (use of copyrighted matter "whose power lies in the author's individualized expression. . . . exceeds that necessary to disseminate the facts.").

C. Amount and Substantiality of the Portion Used Compared to the Copyrighted Work as a Whole

The parties strongly dispute the appropriate method of applying this factor. The language of the statute indicates the appropriate measure is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). However, courts have used a number of different comparisons when analyzing this factor. *See e.g.*, *Harper & Row*, 471 U.S. at 564-66 (assessing quality and quantity of taking; measuring quality as importance of quoted material to both copyrighted work and infringing work and quantity as percentage that copyrighted materials constitute of infringing work); *Salinger*, 811 F.2d at 98-99 (measuring quality as importance of copyrighted work to infringing work and quantity as portion of copyrighted work taken); *Maxtone-Graham*, 803 F.2d at 1263 (assessing quality by importance of materials taken to copyrighted work and quantity by percentage of copyrighted work taken); *Consumers Union*, 724 F.2d at 1050 (measuring quantity as portion of copyrighted work taken); *Meeropol v. Nizer*, 560 F.2d 1061, 1070-71 (2d Cir. 1977) (measuring quantity as percentage that copyrighted materials constitute of infringing work), *cert. denied*, 434 U.S. 1013 (1978); *Craft*, 667 F. Supp. at 128-29 (assessing quality by importance of copyrighted materials to infringing work and quantity as percentage that copyrighted materials constitute of infringing work).

Of course, these courts have not used these various methods because of indifference to the statutory language. Instead, these differing approaches indicate that courts make a pragmatic analysis of this factor, considering both the quality and quantity of the copyrighted materials used and conscious that the factors listed in section 107 are not exclusive. *See id.* at 128.

In *Harper & Row*, the Supreme Court stressed the "qualitative nature of the taking" in determining substantiality. *Harper & Row*, 471 U.S. at 565. In that case The Nation magazine published an article using excerpts from a stolen manuscript of President Ford's memoirs. *Id.* at 543. Because the allegedly infringing passages played a "key role in the infringing work," the Court held that the taking was substantial. *Id.* at 566. *See also Salinger*, 811 F.2d at 99 (quoted passages were substantial because they "make the [infringing] book worth reading").

The Atack book uses Mr. Hubbard's materials in a qualitatively significant way. As stated above, passages from copyrighted works are often set off by themselves at the beginning of a part or chapter in order to set a general tone.[8] In *Harper & Row*, the Court found it significant that the Nation article was "structured around the quoted excerpts which serve as its dramatic focal points." 471 U.S. at 566. Mr. Atack makes much the same use of some of the materials taken from Mr. Hubbard's copyrighted sources.

The other quotations from copyrighted sources are in the text of the book. Unlike the copyrighted materials in *Harper & Row*, these quoted passages are not " 'essentially the heart' " of Mr. Hubbard's copyrighted work. *Id.* at 564 (quoting district court opinion, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)). Still, they are "an important ingredient of the book as it now stands." *Salinger*, 811 F.2d at 99. The focus of the book is frequently on the difference between Mr. Atack's portrayal of events and Church teachings and Mr. Hubbard's. Thus the importance of the copyrighted material to the Atack book weighs in favor of New Era.

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8 *See supra* pp. 9-11.

The quantity of copyrighted material used reinforces this conclusion. Mr. Atack has taken passages from a substantial number of Mr. Hubbard's copyrighted sources. Under these circumstances, it is of little value to measure this taking solely by the amount of copyrighted materials in the book as compared to the volume of the source materials from which they were taken. *See Craft*, 667 F. Supp. at 128-29 (rejecting strict application of this factor in case involving takings from numerous works of author). Such an analysis would reduce copyright protection for authors merely because their materials are lengthy or the body of their work is prodigious; it would conflict with the goal of encouraging authors' creative endeavors. *See Harper & Row*, 471 U.S. at 545-46; *Sony Corp.*, 464 U.S. at 429.

There are slightly less than 4,000 copyrighted words in the book.[9] While this figure is insignificant when compared to the total words in all the copyrighted sources from which they were taken, it represents approximately 2.7% of the volume of Mr. Atack's book. Moreover, the book uses a rather large percentage of some copyrighted sources. In sum, the quoted passages comprise a small, but significant element of the book, and accordingly this factor favors New Era.

D. Effect on the Market

This factor looks to the effect on the potential market for the copyrighted work. New Era asserts that it plans to produce an authorized biography of Mr. Hubbard which will include both his published and unpublished writings. (Heldt Aff. ¶ 7). It contends that the book will seriously impair the market for the authorized biography. (*Ibid.*). The 1976 Act protects the markets for both the original Hubbard source materials and any derivative materials such as New Era's forthcoming biography. *See Harper & Row*, 471 U.S. at 568

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9 This figure results from subtracting the approximately 389 words taken from the *HCO Manual of Justice* from New Era's count of words taken from copyrighted materials in the book, as the copyright on that work has expired.

(effects on potential markets for original and derivative works are relevant when determining fair use).

The Second Circuit has previously addressed the effect on the market for New Era's anticipated biography when analyzing another unauthorized biography of Mr. Hubbard which contained his copyrighted materials. *See New Era*, 873 F.2d at 583. In that case, the infringing book contained a number of passages from unpublished works. The court held that " 'some impairment of the market seems likely,' " and that this factor weighed slightly in New Era's favor. *Ibid.* (quoting *Salinger*, 811 F.2d at 99).

Unlike the biography at issue in *New Era*, here the book does not contain any copyrighted materials from unpublished works. No consumer will be drawn to the book because it contains materials that are unavailable elsewhere. New Era's biography might lose sales to consumers who are reluctant to read two accounts of Mr. Hubbard's life, even if written from different perspectives. Other consumers might decide not to purchase New Era's biography because of the book's negative portrayal of Mr. Hubbard. However, these effects do not result from Mr. Atack's use of copyrighted materials; the book could adversely affect the market for New Era's biography in those ways even if it contained no copyrighted materials at all.

Still, there may be some effect on the market for the copyrighted works because of the book's use of protected materials. Consumers may find after reading the book that they have gotten a sufficient flavor of Mr. Hubbard's writings to deter them from buying the source materials. *Cf. Salinger*, 811 F.2d at 99 (reading excerpts of unpublished letters may "diminish interest in purchasing the originals."). Others may wish to purchase a biography of Mr. Hubbard that contains his writings, and may select the book rather than wait until New Era publishes the authorized biography. Still others might become interested in the subject and stimulated to buy Mr. Hubbard's works. Thus publication of the book could have some effect on the market for the copyrighted works.

In other contexts, the effect on the market has been described as the most important factor in fair use analysis.

See Harper & Row, 471 U.S. at 566; *Salinger*, 811 F.2d at 99. However, in those cases the effect on the market from the alleged infringement was clearer than it is here. In *Harper & Row*, for example, The Nation's use of a stolen, unpublished manuscript had both immediate and tangible effects on the market for President Ford's memoirs. 471 U.S. at 567. In *Salinger*, the court of appeals recognized that use of Salinger's unpublished letters might affect their future value, notwithstanding Salinger's disavowal of any desire to publish them during his lifetime. 811 F.2d at 99.

Here, any effect on the market for New Era's forthcoming biography is speculative. Accordingly, this factor does not favor either party.

To summarize, the first three fair use factors favor New Era and the fourth favors neither party. While section 107 "does not, and does not purport, to provide a rule which may automatically be applied in deciding whether any particular use is 'fair,' " D. Nimmer & M. Nimmer, 3 Nimmer on Copyright § 13.05[A], at 13-65 (1989), Carol has not pointed to any other cogent rationale favoring publication. Indeed, relevant equitable considerations indicate New Era is entitled to an injunction. *Cf. New Era*, 873 F.2d at 595-97 (Oakes, C.J., concurring) (decision whether to enjoin publication is governed by "traditional equitable principles"). In contrast to a prior action to enjoin a critical biography of Mr. Hubbard, here New Era diligently asserted its rights. *See Id.* at 584-85 (injunction denied because of laches). The book is still in manuscript form, so deletion of the infringing passages will be relatively simple and inexpensive.

The only apparent hardships resulting from an injunction are some delay in publication and a more stringent editing process. These do not overcome the general rule that an infringer should be enjoined. *See Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (irreparable harm is normally presumed if infringement is demonstrated).

CONCLUSION

There is a difference between published and unpublished works, even if it is no more than that the use of an unpublished writing misappropriates not only the expression itself but also the author's decision whether to publish it. *Harper & Row*, *Salinger* and *New Era* should be read with that difference in mind. Even so, in this case there is too often republication without that criticism or illumination which comprises fair use rather than infringement.

New Era's motion for preliminary and permanent injunctions is granted. The book may not be published in its present form. Plaintiff may submit a form of judgment on consent or on notice.

Dated: January 30, 1990
New York, New York

/s/ LOUIS L. STANTON
Louis L. Stanton
U.S.D.J.

Appendix C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 3845 (LLS)

Filed Feb. 13, 1990

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Plaintiff,

—v.—

CAROL PUBLISHING GROUP, a New York Corporation and JONATHAN CAVEN-ATACK,

Defendants.

JUDGMENT

Plaintiff, New Era Publications, International, ApS ("New Era"), having brought this action for a preliminary injunction and other relief and the parties having agreed to consolidate the proceedings for a preliminary and permanent injunction pursuant to Fed. R. Civ. P. 65 (a) (2), and a trial of this action having come before the Honorable Louis L. Stanton, District Judge, presiding, and proof having been presented on behalf of the respective parties, and the parties (other than Jonathan Caven-Atack who was not served and has not appeared) having appeared by their respective attorneys, and argument having been heard and considered, and a decision having been duly rendered.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. New Era has complied with the Copyright laws of the United States and is the exclusive licensee of and has good, valid and subsisting copyrights with regard to each of the works of Mr. L. Ron Hubbard listed on the attached Exhibit A which is incorporated by reference into this Judgment.

2. The passages in the manuscript entitled *A Piece of Blue Sky* (the "book") authored by Mr. Atack which are set forth in the attached Exhibit B (which is also incorporated by reference into this Judgment) infringe upon and violate New Era's copyrights and rights thereunder.

3. The defendants and each of them, their directors, officers, agents, attorneys, servants and employees, representatives, and all those persons in active concert or participation with then, in any manner whatsoever, whether directly or indirectly, be and they hereby are permanently restrained and enjoined from publishing, distributing, mailing, selling, or otherwise conveying by any means to any person the book in its present form or otherwise infringing on the plaintiff's copyrights.

4. The defendant Carol is to give notice to its distributors to deliver up to be impounded all copies of the book currently in the possession or control of defendant Carol or its distributors.

5. Jurisdiction of this action is retained for the purpose of making any orders in furtherance of this Judgment and to determine any damages, attorneys' fees and costs to be awarded to the plaintiff, and any further order necessary or proper to be made to effect a final adjustment and settlement of this controversy between the plaintiff and the defendants.

Dated: New York, New York
February 13, 1990

/s/ LOUIS L. STANTON
Louis L. Stanton
United States District Judge

(2)

No. 90-348

Supreme Court, U.S.
FILED
SEP 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Petitioner,

—v.—

CAROL PUBLISHING GROUP,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MELVIN L. WULF
BELDOCK LEVINE & HOFFMAN
99 Park Avenue
New York, New York 10016
(212) 490-0400

Counsel for Respondent

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No. 90-348

In the

Supreme Court of the United States

October Term, 1990

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Petitioner,

-v.-

CAROL PUBLISHING GROUP,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This case involves the application of the fair use provision of the Copyright Act of 1976, 17 U.S.C. § 107, to material in a book published by Respondent.

The book, A Piece of Blue Sky, is a critical biography of the late L. Ron Hubbard, founder of the controversial Church of Scientology. Hubbard was a prolific author. He published nearly 600 fiction and non-fiction works in his lifetime, 111 of which are in print (4a).[1]

At issue in the case are 103 passages taken from 47 different works.[2] All the passages have been previously published by Petitioner, the copyright owner.

The book quotes only a "miniscule amount" from 25 of the 47 works, 5-6% of 12 other works, and 8% or more of 10 works which, with two exceptions, are only 1-3 pages long (14a).[3] The book contains ap-

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[1] References to "__a" are to the Appendix to the Petition for Certiorari. References to "JA __" are to the Joint Appendix filed in the court below.

[2] There were originally 121 passages from 48 different works, but the District Court held and the Court of Appeals affirmed that the copyright of one work containing 18 passages has expired (20a-21a, 26a-27a). The Petition for Certiorari does not challenge that holding.

[3] The length of and the amount of material used from each work is tabulated at JA 106-09.

proximately 147,700 words, of which 4,323, or less than 2.7%, are taken from Petitioner's copyrighted works (15a).

REASONS FOR DENYING THE WRIT

The fair use provision of the Copyright Act is Congress' acknowledgement that scholarship, biography, criticism and journalism require the right to draw to some reasonable extent upon copyrighted works. If there were no such right, the nature of literature about figures and events that affect the course of public life would suffer great harm, commentary, criticism, history and reportage would be seriously impaired, and our nation's commitment to free discourse on matters of public importance would be endangered.

There is no question but that the book at bar serves the purposes intended to be protected by the fair use doctrine, as well as the broader purposes that are related to the interests of the First Amendment. It is a biography of the founder of a controversial social movement, which has a significant following; it draws upon some of Hubbard's published

works to illustrate concretely one or another criticism of Hubbard and the Church;[4] and the portions used in relation to each of the 47 works range from miniscule to insignificant. In addition, all of the allegedly infringing material has been previously published, which is a critical element in the decisional process in a fair use case. Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987), cert. denied, 484 U.S. 890 (1987) and New Era Publications v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989), petition for rehearing and for rehearing en banc denied, 884 F.2d 659 (1989), cert. denied, --- U.S. --- (1990).

The Second Circuit opinion below correctly interprets the specific terms of the fair use provision, and serves the public interests protected by the provision. On the other hand, Petitioner's arguments in support of certiorari are, as we demonstrate, based upon an unreliable reading of the decision below and an at-

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[4] The record includes specific explanations by the author for his use of each of the 103 passages (JA 98-104).

tempt to ignore the critical fact that the case at bar involves previously published material exclusively.

Notwithstanding Petitioner's claims, there is no conflict between the Circuits, there is no conflict with decisions of this Court, there is no departure from the accepted and usual course of judicial proceedings, and there is no unsettled question to be decided by this Court.

1. Petitioner's related points 1 and 2 claim that "the court below established a new, expansive standard for the copying of published works which conflicts with and presumably purports to overrule prior law" (Petition, p. 14), and that its decision "creates widely disparate standards for the permissible copying of published and unpublished works" (id. at 16-17). The essence of Petitioner's claim is that the opinion below authorized "wholesale copying" of its copyrighted works (id. at 15), resulting in the alleged disparate standards.

First, there is no "wholesale copying." As pointed out above, the quantity of material taken from the majority of the

47 works is "miniscule," and only a relatively small portion is taken from the other works. However, if it is said for argument's sake that the amount of copyrighted material is "substantial," that standard has been explicitly authorized by this Court's decision in Harper & Row v. Nation Enterprises, supra at 564: "substantial quotations might qualify as fair use in a review of a published work...."

Second, there is no merit to Petitioner's claim that the Second Circuit established a new, expansive and disparate standard for the copyright of published works. It made no new law respecting the quantity of previously published material to be allowed as fair use. Rather, it distinguished the case at bar from this Court's decision in Harper & Row, which announced a narrow quantitative standard only with respect to previously unpublished material. Referring to the quantity of copyrighted material used in the book at bar, the Second Circuit said: "In the context of quotation from published works, where a greater amount of copying is allowed, see Harper & Row, 471 U.S. at

564, this is not so much as to be unfair" (14a).

There is indeed a disparate quantitative standard as between the use of published and unpublished material, but it is a standard announced by this Court in Harper & Row, not a new standard announced by the Second Circuit.

2. Petitioner's claim number 3 is twofold. It asserts that the court below, in considering statutory factor number three, which requires assessment of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," erroneously failed to consider "the percentage the copyrighted material constituted of the infringing book" (Petition, p. 17), and erroneously measured "the taking ... against the total number of words in copyrighted works from which any copying has been made... (id. at 18). Neither assertion has any merit.

First, as the court below pointed out, "section 107 plainly commands us to consider 'the amount and substantiality of the portion used in relation to the copy-

<u>righted work</u> as a whole'" (16a) (emphasis in original). The statutory language could not be more clear.

Petitioner's second point is factually incorrect. The opinion did not consider the volume of material taken against the total number of words quoted from the 47 works. It explicitly considered the amount taken from each individual work. Its conclusion that "the book uses overall a small percentage of Hubbard's works" (14a), is immediately followed by reference to the amount of materials taken from each of the 48 Hubbard works.

3. Petitioner's claim number 4 asserts that the decision below "changes a crucial aspect of the fair use doctrine by permitting the publication of entirely expressive passages on the grounds that most of the other claimed infringing passages cannot be so characterized" (Petition, p. 20). First, the Second Circuit said no such thing. Second, the assertion itself reflects a fundamental misunderstanding of the law of copyright.

The distinction drawn by the Second Circuit was between "factual" works and

"non-factual" works, stating that "the scope of fair use was greater with respect to the former (11a). The Petitioner's misrepresentation of the opinion's language implies that the correct distinction to be drawn in fair use analysis is between "factual" material and "expressive" material. That is Petitioner's fundamental misunderstanding of copyright law and of the fair use doctrine.

Since copyright law protects only an author's form of expression -- contrasted to the author's ideas or facts contained in the work -- the very purpose of the fair use provision is to provide an exception to the protection of forms of expression, under the circumstances contemplated by the fair use provision. The only reason that this case is in court is because the book contains 103 passages taken verbatim from Hubbard's works, that is, it takes Hubbard's forms of expression. Thus, the analysis, correctly understood by the court below, is not between "factual" and "expressive" material at all, for all of the passages consist of expressive material. The only point being made by the Circuit in the passage misconstrued

by the Petitioner is that, on the spectrum that lies between the expression of pure fact and the expression of pure non-fact, e.g., poetry, the tendency of the fair use decisions is to be more permissive as to the former end of the spectrum than the latter. We don't quarrel with that generality. We do quarrel with Petitioner's erroneous implication that non-factual material, which it calls "expressive" or "creative," is wholly beyond the fair use provision. The opinion below of course said no such thing, and Petitioner's reliance on its misrepresentation as a ground for granting certiorari is falacious.

4. Petitioner asserts in its point number 5 that the Second Circuit's analysis of the market factor "creates new law, making it virtually impossible for the holder of copyrighted works to demonstrate economic injury from copyright of published works." It rests that claim on an "implication" that the court held that "there is no longer any market value to protect once a work has been published" (Petition, p. 20). The Second Circuit's opinion is not that simple-minded.

Rather, it says that material already published does not have the same untapped economic value of unpublished material that might be included in a future work by the copyright holder (19a).

In any case, that particular point is only a tertiary consideration in the opinion below. Much more significant is its holding that it is totally speculative whether use of a small amount of copyrighted material in an unfavorable context will encourage or discourage purchase of a yet unpublished work; and that, even if the effect could be said to discourage purchasers, where the copyrighted work and the critical work "serve 'fundamentally different functions,'" factor No. 4 favors the critical work, relying on Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), cert. denied 481 U.S. 1059 (1987), and Consumers Union v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983) (18a). Thus, the Second Circuit's conclusion regarding the market factor is not novel but rests on established precedent within the Circuit, and is not in conflict with any decision of this Court.

5. Petitioner is quite correct to point out that there has recently been considerable and sometimes controversial litigation concerning the fair use doctrine (Petition, pp. 12-13). But it neglects to point out that, without exception, the controversy has been over establishment of a new and different standard for testing the scope of the fair use provision as applied to previously unpublished material. See Harper & Row v. Nation Enterprises, supra; Salinger v. Random House, Inc., supra; New Era Publications International v. Henry Holt & Co., supra. There has been no dispute at all over the fair use doctrine as applied to previously published material. Indeed, in New Era Publications International v. Henry Holt & Co., supra, perhaps the most controversial of the recent decisions, in addition to the unpublished passages which were the focus of the decision in the Second Circuit, there were also 69 passages of previously published material that were held protected as fair use with no controversy whatsoever. Judge Miner simply noted that the District Court had found those passages to be non-infringing

under the fair use provision, and made no further comment. 873 F.2d at 580.

The opinion of the Second Circuit in the case at bar is totally consistent with prior law on application of the fair use doctrine to previously published material. It is Petitioner's argument that one or another aspect of the decisions involving previously unpublished material should affect analysis involving previously published material as well. There is no basis for that claim except wishful thinking. This Court's opinion in Harper & Row v. Nation Enterprises, supra, at 564, was explicit in the distinctive fair use treatment to be given previously published material as compared to previously unpublished material.

(3)

No. 90-348

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IN THE

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NEW ERA PUBLICATIONS INTERNATIONAL, ApS,
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—v.—

CAROL PUBLISHING GROUP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ERIC M. LIEBERMAN
Counsel of Record
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway–Fifth Floor
New York, New York 10003
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway
New York, New York 10003
(212) 982-9870

JONATHAN W. LUBELL
MORRISON COHEN SINGER & WEINSTEIN
750 Lexington Avenue
New York, New York 10022
(212) 735-8600

Counsel for Petitioner

October 4, 1990

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the copyrighted works, amounting to approximately 2.7% of the infringing work. Brief in Opposition at 2-3. The extent of the unauthorized taking therefore belies respondent's claim that it is not "substantial."[1]

In the alternative, respondent contends that this Court has indeed authorized "substantial" taking of published copyrighted material. Brief in Opposition at 6. Specifically, respondent relies on this Court's statement in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 564 (1985), that "substantial quotations might qualify as fair use in a review of a published work. . . ." Brief in Opposition at 6. Petitioner has previously shown that this Court's suggestion in *Harper & Row* that substantial copying of a *review* "might" be permitted in certain circumstances is no authority for the substantial copying in respondent's *biography*. Petition at 15. Respondent nowhere responds to petitioner's argument. Petitioner submits that this Court's limited hypothetical suggestion regarding literary reviews should not be interpreted as a license for substantial taking from all published works. Certiorari should be granted because the court below has announced a new standard authorizing substantial takings of published works outside the narrow circumstances indicated in *Harper & Row*.[2]

2. Respondent fails to justify the refusal of the court below to consider in any meaningful way the amount of the takings in relation to the infringing work or in relation to each of the particular works from which they were taken.

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1 Respondent's position is also clearly contradicted by the case law. *See, e.g., Meerpol* v. *Nizer*, 560 F.2d 1061, 1070-71 (2d Cir. 1977), *cert. denied*, 434 U.S. 1031 (1978); *Craft* v. *Kobler*, 667 F.Supp. 120, 128-29 (S.D.N.Y. 1987).

2 Petitioner does not dispute here that there may be some difference in the amount of permissible copying from published and unpublished works. Petitioner submits, however, that the decision of the court below establishes a new standard for copying of published works, and thereby creates a wide gulf between permissible copying of published and unpublished works which is without precedent and is not authorized by any decision of this Court.

It is not disputed that the non-exclusive fair use factors authorize consideration of the amount and substantiality of the taking in relation to the copyrighted work. 17 U.S.C. § 107(3). But respondent and the court below refuse to acknowledge that this Court has authorized consideration of the amount of the taking in relation to the infringing work as an important method of assessing the third fair use factor. *Harper & Row*, 471 U.S. at 565-66. Analyzing the taking as a percentage of the infringing work is especially important where an overall substantial amount of copyrighted expression is taken from a number of works. Respondent's mere quotation of the court's citation to the statute, Brief in Opposition at 7-8, hardly justifies that court's refusal to undertake an analysis endorsed by this Court and adopted by the lower court, *see* cases cited in Petition at 17, which is critical to a proper assessment of the extensive taking in this case.

Respondent suggests that the court below did individually consider the amount of the taking from each of the copyrighted works. Brief in Opposition at 8. The fact that the court recited the groupings, provided by the parties, of the copyrighted works by percentages taken, 14a,[3] in no way shows that the court properly considered these facts in its analysis or reached a correct disposition. Despite the listing of percentages, the court merely concluded that "the book uses overall a small percentage of Hubbard's works." 14a. The court failed to give any significance to the fact that respondent copied high percentages of particular works. *See* JA 113-116. There is no authority permitting the copying of all or most of some copyrighted works merely because small percentages of longer works are also taken. Yet this is what the court below has done.

3. Respondent's discussion of the distinction between "factual" and "expressive" material mischaracterizes the position of the court below as well as that of petitioner. The impor-

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3 References to "____a" are to the Appendix to the Petition. References to "JA ____" are to the Joint Appendix filed in the court below.

tant point is that respondent cannot refute that the court below condoned the copying of expressive material, such as poetry, on the ground that a greater part of what respondent took was purportedly "factual" material. Respondent also fails to contradict petitioner's point that the court below erroneously held that philosophical and religious writings are factual.[4]

Respondent first suggests that the distinction between "factual" works and "creative" or "expressive" works is an improper one created by petitioner. Brief in Opposition at 8-9. In fact, it is a distinction drawn by the court below, see 13a, and is merely another way of articulating the distinction between "factual" and "non-factual" works, a distinction which respondent apparently accepts. Brief in Opposition at 8-9. After engaging the drawing of meaningless semantic distinctions, respondent finally acknowledges that courts permit greater use of factual as opposed to non-factual (read creative or expressive) material. Brief in Opposition at 10. Since respondent admits that non-factual material, like poetry, is entitled to greater protection, it cannot refute that petitioner has been injured by the decision of the court below (1) to treat philosophical and religious writings as "factual" and then (2) to overlook the taking of creative expression because "most" of the takings, including the takings of religious and philosophical writings, are allegedly factual. 13a.

As noted above, respondent never defends the decision of the court below regarding these two last points. Instead, it erroneously attributes to petitioner the argument that expressive material is "wholly beyond the fair use doctrine." Brief in Opposition at 10. Petitioner, of course, has not suggested that use of expressive material is never permitted. Rather, petitioner has argued that certiorari should be granted because the court below has (1) authorized the copying of expressive material if it is copied together with factual mate-

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4 Respondent is silent on this point, presumably because it would have difficulty defending a position which even caused the court below "some hesitation." 11a.

rial and (2) has designated religious and philosophical works as factual.

4. Regarding the market impact factor, respondent suggests that petitioner has overstated the position of the court below regarding the diminution of a copyrighted work's value once it has been published. Respondent claims the court merely held that published material does not have "the same" economic value as unpublished works. Brief in Opposition at 11. Respondent has grossly understated the sweep of the court's statement, as an objective review of the opinion will show. In the court's view, because the copyrighted works are published, the infringing "book will not tap *any* sources of economic profit that would otherwise go to the authorized biography." 19a (Emphasis added). This unequivocal language marks a clear, unwarranted change in the law.

Attempting to deflect attention from the court's unprecedented devaluation of published copyrighted works, respondent suggests that the court's market factor analysis rested principally on the position that it is "speculative" whether use of copyrighted material "in an unfavorable context" will discourage purchase of a forthcoming favorable biography. *See* 17a and Brief in Opposition at 11. This rationale provides no firmer footing for the court's opinion. The theory that the copying in an "unfavorable context" of copyrighted material results in no economic impact on the copyrighted work is simply a license for theft. Copyrighted works do not lose their protection because the infringer places what he has taken in a critical or unfavorable context.

The view adopted by the court is not "established precedent within the [Second] Circuit," as respondent asserts. Brief in Opposition at 11. The Second Circuit in *New Era Publications International, ApS* v. *Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989), reversed a district court finding on the fourth fair use factor in favor of the infringer which had been based in part on the same view. *See New Era Publications International, ApS* v. *Henry Holt & Co.*, 695 F.Supp. 1493, 1522-23 (S.D.N.Y. 1988). Given the unsettled status of

the case law regarding the questionable proposition that copying in an unfavorable context has no economic impact, respondent's contention that this proposition was critical to the court's decision provides all the more reason to grant the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway—Fifth Floor
New York, New York 10003
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway
New York, New York 10003
(212) 982-9870

JONATHAN W. LUBELL
MORRISON COHEN SINGER
& WEINSTEIN
750 Lexington Avenue
New York, New York 10022
(212) 735-8600

Counsel for Petitioner

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